CHAPTER 2

JURISDICTION[1]

A. Introduction

The Department of Fair Employment and Housing (DFEH) exists and operates pursuant to the Fair Employment and Housing Act (FEHA) set forth at California Government Code section 12900, et seq., in addition to the Unruh Civil Rights Act (Civ. Code, § 51) and Ralph Civil Rights Act (Civ. Code, § 51.7).

DFEH is empowered to "receive, investigate, and conciliate complaints alleging practices made unlawful . . ." by those statutes.[2] Additionally, DFEH's Legal Division is authorized to prosecute cases before the Fair Employment and Housing Commission (FEHC) or in the Superior and appellate courts of California.

"Jurisdiction," the term used to describe DFEH's power, authority or authorization to accept and process complaints,[3] means having "the right, power, or authority to administer justice by hearing and determining controversies" and refers to "the extent or range of judicial, law enforcement, or other authority."[4]

DFEH has authority to investigate, at the outset, the question of whether it has jurisdiction over a complaint. If that inquiry results in a determination that DFEH lacks jurisdiction over the complaint, it has *no* authority to investigate, conciliate or litigate the case and the complaint must be dismissed.[5] Therefore, before analyzing any other aspect of a complaint, it must first be established that DFEH has jurisdiction to proceed.

There are two basic jurisdictional aspects that must be considered: Procedural and subject matter.

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[1] This Chapter is devoted to employment, Unruh Civil Rights Act, and Ralph Civil Rights Act complaints.

[2] Gov. Code, § 12930, subds. (f)(1) and (f)(2).

[3] DFEH exists and operates pursuant to the provisions of the FEHA, Unruh and Ralph Civil Rights Acts.

[4] Dictionary.com. Dictionary.com Unabridged (v 1.1). Random House, Inc. http://dictionary.reference.com/browse/jurisdiction

[5] Where applicable, reference is made to DFEH Enforcement Division Directives Manual (DFEH Directives) which outlines procedures to be followed in specific instances. DFEH Directives and this Case Analysis Manual should always be read together, along with relevant sections of other DFEH manuals and handbooks in order to assure that all procedural and substantive aspects of a particular matter are handled appropriately, thereby providing the highest possible level of customer service to the public.

1. "Procedural jurisdiction" requires that certain procedures set forth in the FEHA be followed. As explained in detail below, if those procedures are not followed, DFEH is deprived of jurisdiction to proceed.

   Procedural aspects of jurisdiction include whether the complaint was filed within the applicable statute of limitations, properly verified and timely served upon the respondent(s).

2. "Subject matter jurisdiction" refers to the fact that the complainant, respondent, and the violations the respondent(s) is alleged to have committed must all fall within the FEHA's parameters.

   For example, subject matter jurisdiction addresses the question of whether the respondent alleged to have engaged in discriminatory acts employed five or more employees and whether the unlawful acts complained of constitute, if proven to have occurred, violations of the FEHA.

If all of the required jurisdictional elements applicable to a given case are demonstrated, DFEH has the legal power and authority to proceed. Conversely, if a single required element is lacking, DFEH does not have jurisdiction and lacks the power to act upon a complaint. Thus, it is *critical* for DFEH staff to understand and be able to apply the concepts that determine whether DFEH has jurisdiction over a complaint and the parties.

In general, it is DFEH's burden to prove by a preponderance of evidence that all jurisdictional requirements have been met. For some jurisdictional claims, however, it is the respondent's burden to prove that DFEH *lacks* jurisdiction (e.g., the respondent is exempt from coverage because it is a religious, non-profit employer).

B. Procedural Considerations

Statute of Limitations within Which to File a Complaint

"Statute of limitations" is the term used to describe "a statute setting a time limit on legal action in certain cases."[6] Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[7]

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[6] "Statute of Limitations." The American Heritage Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004.

[7] *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 488, citing *Adams v. Paul* (1995) 11 Cal.4th 583, 592, quoting *Order of Railroad Telegraphers v. Railway Express Agency* (1944) 321 U.S. 342, 348-349.

"No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred,"[8] unless, as explained in detail below, a specific exception to the one-year statute of limitations is applicable.

1. Computation of the Statute of Limitations

a. When the Unlawful Conduct Occurred

The running of the one-year statute of limitations commences when the unlawful conduct, which forms the basis for the complaint, occurs. Therefore, in order to ascertain whether a complaint has been timely filed, i.e., within the statute of limitations, it is imperative to determine when the alleged unlawful conduct occurred.

When a distinct act of harm, e.g., termination of the complainant's employment, is at issue, the date may be determined easily (although it may still be disputed by the respondent(s).) However, it may be more difficult to calculate the applicable statute of limitations when a pattern or course of conduct is alleged.

1) Distinct Act(s) of Harm

If a complainant alleges that he/she was subjected to one or more distinct unlawful acts, e.g., specific incidents of harassment culminating in a termination of the complainant's employment, it will, in most instances, be clear when the *final* unlawful act occurred.

However, when the complainant alleges that multiple incidents or events took place over a period of time, it may not be readily apparent when the final act of harm occurred for purposes of calculating the last date upon which a complaint may be timely filed with DFEH.

When the statute of limitations is in dispute, the courts and FEHC must make a reasoned assessment of the facts and resolve the conflict, guided by overriding notions of common sense, logic and fairness. Among the factors considered is whether a reasonable person such as the complainant would or should have realized that he/she was being subjected to discrimination, harassment or retaliation and that he/she needed to take steps such as filing the complaint in order to protect and preserve his/her right to pursue a remedy.

[8] Gov. Code, § 12960, subd. (d).

a) Termination of Employment

For the purpose of determining the last date upon which a complaint may be timely filed, the date that the complainant was actually discharged from his/her employment controls, even if the complainant was notified in advance that his/her employment would conclude.

The complainant's request(s) that the employer reconsider the termination decision will *not* push the operative date of harm past the point that the complainant stops rendering services to the employer,

> *Example: The complainant was notified by his supervisor on December 6 that the company was unhappy with his performance and intended to terminate his employment. In lieu of immediate termination which would cause him to lose one-half of his pension benefits, he was offered a one-year teaching fellowship at the end of which he would be able to retire. So he accepted the company's offer and began teaching on June 1. He involuntarily retired one year later, May 31.*
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> *He filed a complaint with DFEH on September 18, alleging discrimination because of his age and retaliation. He received a right-to-sue letter on September 21, and commenced litigation on December 9.*
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> *The employer argued that the complainant's claims were time-barred because he did not file a complaint within one year of receiving notification that his employment would be terminated. The employer contended that the statute of limitations to file a complaint expired on December 6, one year after the complainant was give a choice between immediate termination of his employment or the one-year teaching fellowship followed by retirement.*
>
> *The California Supreme Court disagreed, ruling that the statute of limitations began to run on the date the complainant's employment actually terminated, i.e., May 31.*
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> *(1) The relevant unlawful practice at issue was the employer's "discharge" of the complainant, as that term is used in Government Code section 12940.*

The public policy undergirding the FEHA is the protection of California employees from a loss of employment on prohibited grounds (as set forth in Gov. Code, §§ 12920 and 12921). Under the law, a statute of limitations does not begin to run until the affected party is entitled to begin litigation on the underlying claim(s). Since the usual and ordinary meaning of "discharge" is "to terminate employment," the complainant would not be able to begin litigation nor would the applicable statute of limitations begin to run until after the unlawful employment practice has occurred, i.e., on the date the complainant's employment was actually terminated.

(2) The interpretation is consistent with the remedial purpose of the FEHA, i.e., to safeguard the employee's right to seek, obtain and hold employment free from discrimination[9], as well the FEHA's own command that it be interpreted liberally in order to provide the broadest possible protections.[10]

(3) Such interpretation promotes the resolution of potentially meritorious claims because "most employees become aware of and begin to pursue their legal remedies for unlawful discharge only after the dismissal has occurred."

(4) The result is inherently equitable and protects respondents from defending stale claims. The notice period that precedes termination of a complainant's employment is generally short and both dates are within the employer's control, therefore, the employer's ability to access and retain evidence is not compromised. The employer may decide whether to provide employees with short or long notice periods based upon their knowledge that the date employment actually concludes will control for the purpose of calculating the statute of limitations.

(5) The actual date of termination of employment is easier to ascertain and less susceptible to dispute than is the date notice was purportedly given orally or in writing with or without witnesses present.

(6) The result prevents the premature and "potentially destructive claims" that would result from requiring an employee to file a complaint with DFEH upon receiving notice of his/her impending termination, but

[9] Gov. Code, § 12920.

[10] Gov. Code, § 12993, subd. (a).

while still employed. Aside from requiring the employee to seek a remedy and the courts to adjudicate a claim for a harm that had not actually occurred, such result "would reduce sharply any chance of conciliation between employer and employee and draw DFEH into investigations that might have been avoided through informal conciliation."[11]

Example: The complainant had been employed by a university for 21 years, progressively receiving salary increases and promotions and excellent performance reviews. She was diagnosed with fibromyalgia after having been employed for about ten years and claimed that after she discovered unlawful behavior by her immediate supervisor and refused to adhere to his directives to engage in unlawful behavior herself, he engaged in a pattern of harassment designed to exacerbate her disability and force her to leave her employment. Eventually, the chronic pain and fatigue she experienced did worsen to the point that she could no longer work so she opted to avail herself of her right to take disability retirement.

She commenced suit alleging, among other theories, that her employment had been constructively terminated. The employer argued that her complaint was not filed within the statute of limitations since it was filed more than one year after the date upon which the complainant signed her application for disability retirement.

The court found that the date her disability retirement became effective controlled for the purpose of ascertaining when the statute of limitations elapsed. The cause of action "accrues when the employment is actually terminated, whether by the employer or the employee. In the instant case, that would be the day complainant commenced her disability retirement since the act of taking disability retirement was the functional equivalent of a constructive discharge."[12]

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[11] *Romano v. Rockwell Inc.* (1996) 14 Cal.4th 479.
[12] *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293.

b) Denial of Tenure and Subsequent Termination of Employment

When a complainant is notified that he/she will not be granted tenure and his/her employment is subsequently terminated in accordance with that notification, does the statute of limitations begin to run on the date that notice is delivered or when the complainant's employment is actually terminated?

> *Example: A university professor was advised that, based upon recommendations from the tenure committee, the university would not grant him tenure. Rather, he was offered a one-year "terminal" contract, at the expiration of which his employment would terminate. He complained that he was denied tenure because of his national origin. Indisputably, the denial of tenure preceded the termination of his employment by more than one year. The Supreme Court rejected the complainant's argument that the statute of limitations should begin running as of the date his employment concluded.*
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> *In this case, the key to the Court's ruling was the claimed violation, i.e., the decision to deny him tenure. Because the complaint was framed in that manner, the violation occurred when the tenure decision was made and communicated to him. The alleged discriminatory practice was not the actual termination of the complainant's employment – that "was simply an inevitable consequence of [the denial of tenure]."*
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> *The Court found the complainant's assertion of a continuing violation theory inconsistent with the allegations contained in his complaint. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."*[13]

c) Denial of Selection

Other Applicant Selected

When the complainant alleges that he/she was denied selection for a specific position or job, promotion or transfer, the date of

[13] Because no California court has ruled on the issues presented by this case, if a potential complaint involves similar facts, DFEH staff should seek guidance from a DFEH Legal Division Staff Counsel concerning whether or not the complaint should be accepted for investigation.

harm is deemed to be the date that the successful candidate assumed the position in question. In other words, the date that the applicant who was selected commences work in the position or job sought by the complainant is the date the alleged harm to the complainant occurred. The date that the complainant is notified of the hiring or promotional decision does not begin the statute of limitations running.[14]

No Applicant Selected

When the complainant alleges that he/she was denied selection for a specific position or job, promotion or transfer and no other employee or applicant was placed in the position, the date of harm is deemed to be the date that the complainant was notified of the denial.

Civil Service or Other Selection Roster

If the complainant alleges that establishment of his/her placement or rank upon a civil service or other roster constitutes discrimination, the date of harm is deemed to be the date that the list was established/published, rather than the date that another applicant on the list was selected and placed in a particular position/job.

If the complainant has filed a grievance with the applicable collective bargaining unit claiming denial of selection for a job or position, promotion or transfer, the date that the candidate who was selected assumed the position will be deemed the last date of harm, rather than the date that the grievance or other appeal process concludes or the complainant's appeal rights are exhausted.

As noted above, if no other employee or applicant was placed in the position, the date of harm is deemed to be the date that the complainant was notified of the denial.

2) Continuing Violations

The complainant may allege that the employer maintained a discriminatory employment policy, practice or system spanning a period of time. The date upon which the statute of limitations

[14] There is no California ruling on this issue yet on record, so DFEH staff should consult a DFEH Legal Division Staff Counsel if a complainant wishes to lodge a complaint setting forth similar facts.

elapsed is a question of fact, dictated by the specific circumstances of the case.

> The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a [complainant] who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. [A] systemic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his/her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions.[15]

The complainant must introduce sufficient competent evidence to show that at least one act occurred within the statutory limitations period *and* the unlawful conduct in question is "more than the occurrence of isolated or sporadic acts . . ." Thus, under the "continuing violation" doctrine, DFEH will have jurisdiction over those acts that occurred outside the limitations period only if the alleged unlawful conduct:

a) Was sufficiently similar in kind – recognizing, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms;
b) Occurred with reasonable frequency; and
c) Has not acquired a degree of permanence.

The first two requirements address the issue of relatedness. "If the employer's actions were sufficiently similar and reasonably frequent the actions will be deemed a continuing course of conduct rather than separate acts of misconduct, and the statute of limitations would not bar an offending employer's liability for even its earliest failure to accommodate."[16]

However, the courts have recognized the injustice that would inure to employers if statutes of limitations were extended indefinitely. Thus, the "permanence" factor "sets an outside limit on the length of time a

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[15] *Morgan v. Regents of the University of Cal.* (2000) 88 Cal.App.4th 52, 64, citing *Green v. Los Angeles County Superintendent of Schools* (9th Cir. 1989) 883 F.2d 1472, 1480.
[16] *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031.

course of conduct may continue before it will be barred."[17] It refers to cases in which the complainant complained to the employer, asking that the unlawful policy, practice or system be alleviated, but the employer refused to honor the request.

The FEHC or court will evaluate the facts to establish the date upon which the "employer's statements and actions ma[d]e clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile."[18] The statute of limitations will be calculated with reference to the date the employer's refusal was communicated to or should have been understood by a reasonable employee.

Thus, when the complainant alleges a continuing course of unlawful conduct, the statute of limitations will begin to run on one of two dates, depending upon the facts:

a) When the course of conduct came to an end.

   The employer may have ceased the unlawful conduct. Alternatively, the employee may have resigned his/her employment or been discharged. O*r*

b) The employee was put on notice, as described above, that "further efforts to end the unlawful conduct will be in vain."[19]

   <u>Example</u>: The complainant was a civil engineer who had been employed for three years when she began experiencing tremors and difficulty walking. Within a few months, she began utilizing a wheelchair and was diagnosed with multiple sclerosis. She took a leave of absence, after which she returned to work on a part-time basis. Prior to taking the leave, she had requested reasonable accommodations of her disability, including a modified work schedule, transfer to a wheelchair-accessible location, computer software and a bed where she could, consistent with her doctor's guidelines, rest during her lunch and break periods. Her requests were not granted and eventually, after attempting to perform her duties without accommodation for approximately three years, she was forced to resign her position.

   The complainant contended that her employer not only failed to engage in a good faith interactive process and grant her

[17] *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031.
[18] *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.
[19] *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.

requests, but also perpetrated a continued pattern of harassment and retaliation which included relocating her to an inferior office and assigning work in rugged outdoor locations that the employer knew she could not access using her wheelchair. In total, she argued that the employer's conduct spanned a period of more than five years, almost to the date that she left her employment. She claimed that she received "mixed signals" regarding her accommodation requests, including ambiguous statements from the human resources manager.

In contrast, the employer asserted that "at several critical junctures over the five-year period in question, it made clear to [the complainant] that she was not going to be reasonably accommodated and that 'nothing was going to change.'"

Factual analysis of the parties' dealings with each is required in order to determine at what point, if any, the employer communicated to the complainant, in a manner a reasonable person would understand, that any further efforts on her part to obtain the requested accommodations and secure for herself a workplace free from harassment and retaliation would be futile.[20]

Example: The complainant alleged that her employer, a city automotive services department, subjected her to discrimination because of her sex (gender) by assigning her to perform clerical and administrative tasks, but assigned technical duties to men with inferior qualifications. She claimed that after a new foreman was hired, he prohibited her from working in the employer's shop area and began performing the technical tasks she had completed satisfactorily during the previous two years. She contended that he told her to work in the front office "where [she] belonged."

She filed a grievance, in response to which the city offered her a position as a meter reader, informing her that it was the only way she could get away from the situation in the automotive services department. She accepted the transfer and remained in that position for a year before transferring back to the shop. She believed when she transferred back to the shop that she would be allowed to resume performing technical work, but within two weeks, realized that was not the case. She did not complain further, however, opting to "bide [my] time."

[20] *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798.

The city argued that the complainant knew at the point that the newly hired foreman took over the technical duties she had previously performed that she was being subjected to alleged sex (gender) discrimination. When she transferred back to the shop and was once again not allowed to perform technical functions, she was aware that her rights were possibly being violated but opted to "bide [her] time." Therefore, the city asserted that her claims were beyond the statute of limitations.

The complainant characterized the events in question as "a series of closely related similar occurrences that took place within the same general time period and stem from the same source" that should be deemed a continuing violation occurring within the statutory limitations period.

The court sided with the city, finding it "difficult to perceive the alleged adverse actions as a continuing course of conduct." Not only had the complainant's circumstances reached permanence more than a year before litigation was commenced, the various incidents about which she complained looked to the court "like a collection of isolated employment decisions." In particular, she filed a grievance about a year after the new shop foreman was hired, in answer to which the city's "only response was to give her the opportunity to transfer out of the department. We can conceive of little that would be a more definitive denial of [complainant's] request to perform certain job duties than an offer to transfer her out of the job altogether." Indeed, the complainant admitted she accepted the transfer believing that it was her "only choice." Her hope that she would be able to resume performing technical tasks when she transferred back was baseless since she never discussed the matter with the public works manager or any other supervisor. Her circumstances became "permanent" and "she should have known that further efforts to resolve the situation would be futile."[21]

<u>Example</u>: The complainant sought to invoke the continuing violation doctrine to bring her allegations of workplace sexual harassment committed by several different individuals before the court. She alleged a few incidents in 1997 about which she did not complain, but did inform her manager of one isolated event in 1998 to which the employer responded immediately and appropriately.

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[21] *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031.

Most of the incidents at issue occurred beginning in 1999. After complainant wrote a letter to the employer, an investigation was launched. A couple of isolated occurrences in 2000 were not reported and the complainant admitted that no incidents occurred in 2001.

The complainant filed a complaint with DFEH in November 2000, in which she contended that one of her co-workers harassed her on "12/24/99 or later." She filed a second complaint on June 16, 2001, in which she asserted that she was subjected to sexual harassment by a number of her co-workers from "approx 10/97 - 3/5/01."

The court found the complainant's allegations of conduct that occurred prior to June 16, 2000, time-barred, unconvinced by the complainant assertion of the continuing violations doctrine. The behavior in question was "discrete, intermittent and discontinuous." Most importantly, the complainant did not allege that a single incident occurred within the applicable one-year statute of limitations. Thus, it held there was "no timely allegation with which the continuing-violation doctrine could tie these earlier incidents."

A continuing pattern of sexual harassment "can bring in acts outside the statutory period where the unlawful actions were sufficiently similar in kind to those that occurred within the statutory period, occurred with reasonable frequency and had not acquired a degree of permanence," meaning that it should have been apparent to the complainant that his/her complaints were "falling on deaf ears" and would not result in action by the employer calculated to remedy or cure the behavior.

Only as to the behavior of one of her co-workers which the complainant alleged took place "12/24/99 or later" did the court find the conduct sufficiently related to the co-worker's behavior within the statutory period to be part of a continuing violation. Those incidents, however, spanned a period of six months and were, like the other acts alleged, "sporadic and isolated" rather than severe or pervasive.[22]

[22] *Saindon v. Federal Express Corporation* (N.D. Cal. 2003) WL 1872959 [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

b. Establishment of the Complaint Filing Date

The filing date is the date upon which the signed complaint was received by DFEH.

In accordance with DFEH Enforcement Division Directive 205, the lower right corner of each complaint is stamped with the date and the word "received." The date the complaint is actually received in one of DFEH's offices may likely differ from the date the complaint was signed, especially if it is delivered to DFEH via U.S. mail.[23] However, the date of receipt is controlling.

c. Computation of the One-Year Statute of Limitations

As noted above, "[n]o complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred." As used in that section, "year" means 365 days.

In order to calculate the last date upon which a complaint may be timely filed, the year is determined by excluding the first day and including the last. In other words, the one-year period begins on the day *after* the discriminatory act in question and ends 365 days later.

If the last filing date falls on a Saturday, Sunday or legal holiday, when DFEH's offices are closed, the last day to file the complaint is the next business day.[24]

> *Example: The complainant's employment was terminated on April 4, 2006. The one-year statute of limitations began to run the following day, April 5, 2006. Stated differently, April 5, 2006, was the first day of the one-year limitations period. April 4, 2007, was the last date upon which the complainant could timely file a complaint with DFEH alleging that the termination violated the FEHA.*
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> *Example: The complainant's employment was terminated on May 26, 2006. The one-year statute of limitations began to run the following day, May 27, 2006. Stated differently, May 27, 2006, was the first day of the one-year limitations period. May 26, 2007, would ordinarily be the last date upon which the complainant could lodge a complaint with DFEH. However, in 2007, May 26 was a Saturday. Moreover, the next day that would ordinarily have been a business day, Monday, May 28, 2007, was a legal holiday, Memorial Day, and all DFEH offices were closed. Therefore, the last date upon which*

[23] *DFEH v. Ametek, Pacific Extrusion Division* (1980) FEHC Dec. No. 80-11.
[24] Cal. Code Regs., tit. 2, § 7407(c)(1); Gov. Code, §§ 6800-6803, Civ. Code, §§ 10-11.

the complainant could have filed a complaint with DFEH was Tuesday, May 29, 2007.

d. Extension of the One-Year Statute of Limitations

There are specific, limited circumstances under which the one-year statute of limitations may be extended.

1) Ninety Days to Discover Unlawful Practice

The one-year limitations period may be extended "[f]or a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence."[25] The 90-day period is computed the same way as the one-year limitations period, that is by excluding the first day and including the last, and is similarly extended in the event that the last date falls upon a Saturday, Sunday or holiday observed by DFEH.

Example: The complainant's employment was terminated on April 5, 2006. According to the employer, layoffs were necessary due to a "business slowdown." The last date upon which to lodge a complaint with DFEH would ordinarily have been April 5, 2007.

Two months before his termination, he filed an internal complaint with his employer alleging that he was not selected for a promotion because of his race and color, African-American and black. The complainant acquired knowledge, for the first time, on April 18, 2007, that several of his co-workers with less seniority and experience, as well as fewer job-related skills, were hired back by the employer as soon as the business climate improved. However, he was not offered the opportunity to return to his position. He believes that he was targeted for layoff and not called back to work in retaliation for having filed a complaint.

In this instance, the complainant had an additional 90 days from the date upon which the one-year statute of limitations elapsed, i.e., 90 days from April 5, 2007, in which to file a complaint with DFEH. Thus, the last date upon which he could timely lodge a complaint was July 4, 2007. However, that date was a holiday when DFEH was closed for business, therefore, the statute of limitations expired on July 5, 2007.

[25] Gov. Code, § 12960, subd. (d)(1).

2) One Year to Discover Employer's Identity

The one-year statute of limitations may also be extended "[f]or a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer."[26]

3) One Year to Discover Identity of Perpetrator of Hate-Based Conduct

The one-year statute of limitations may be extended "[f]or a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation."[27]

4) One Year after Age of Majority Attained

The one-year statute of limitations may be extended "[f]or a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority."[28] The age of majority in California is 18.

> *Example: The complainant was employed at a fast food restaurant for a period of approximately one year when she was 14 - 15 years old. She claimed that she was subjected to workplace sexual harassment by the restaurant's owner/manager that included inappropriate and offensive touching and discussions about sexual topics and behaviors that made her extremely uncomfortable. When the complainant informed her father about the workplace conduct to which she had been subjected, he insisted that she quit her job and, in fact, called the owner/manager and informed him that the complainant would not be returning to work.*
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> *The complainant was born on August 17. On January 17, five months after her eighteenth birthday, she filed a complaint with DFEH, naming the fast food restaurant and its owner/manager as respondent. All of the unlawful conduct alleged took place at*

[26] Gov. Code, § 12960, subd. (d)(2).
[27] Gov. Code, § 12960, subd. (d)(3).
[28] Gov. Code, § 12960, subd. (d)(4).

least three to four years prior to the date upon which she filed the complaint.

The respondent argued that, because of the period of time that elapsed between the alleged incidents and the date when the complaint was filed, it was barred by the statute of limitations and should be dismissed. The respondent also contended it would be inequitable that it was unfair to expect him to defend a "stale" claim, i.e., one founded upon alleged conduct that occurred several years prior to the filing of the complaint.

The respondent's arguments lacked merit. The plain language of the FEHA provides that a minor, i.e., person under the age of 18, who is subjected to unlawful conduct, may file a complaint at any time up to one year following his/her eighteenth birthday.

Therefore, the complainant's complaint was filed well within the statute of limitations which would have expired on her nineteenth birthday, August 17, or eight months later than she actually filed her complaint. The fact that the allegations occurred more than one year prior to the date of filing is irrelevant when the complainant was a minor at the time the conduct complained of took place.

5) Equitable Tolling

"Equitable tolling" is the legal term used to describe the act of suspending or extending the time period in which to accomplish a specific task on equitable, fair or just grounds.

Both the one-year statute of limitations and the 90-day extension thereof may be equitably tolled under appropriate circumstances, i.e., when justice dictates that result. The courts and FEHC will toll a statute or other time limitation when it is the only result which will avoid an innocent party suffering an injustice such as the deprivation, through no fault of his/her own, of a particular right or remedy. They have held that filing a complaint with DFEH is not a jurisdictional prerequisite, i.e., a requirement that deprives DFEH of jurisdiction to proceed, but is, rather, a requirement subject to an exception when justice demands that result.

<u>Example</u>: The complainant alleged that her employer discriminated against her because of her physical disability, epilepsy, when she was prohibited from resuming her duties as a "pantry person" or "prep cook" following a non-work-related injury unless her treating physician was able to absolutely

guarantee that she would not have a seizure in the workplace. Her employment was terminated when the complainant's physician could not provide such assurance. Rather, he stated in writing:

> I feel that with her recent history of excellent control, there is every reason to believe in the likelihood of resumption of this control, particularly with the medication modification, although as indicated, there is no way to absolutely guarantee. I feel that the patient is and should be considered employable at any job where loss or alteration of consciousness would not represent a significant hazard to her or to others with her such as painting the outside of buildings, climbing roofs, flying airplanes, etc. I do not feel that from a practical standpoint there is a really significantly increased hazard to the patient or others in her present occupation as a cook and I certainly hate to see the patient declared unemployable and 'disabled' on the basis of a very infrequent and almost completely controlled disorder, since most of these patients indeed can be and are gainfully employed in my experience.

Unfortunately, the complainant was not advised of the applicable statute of limitations for filing a complaint during her initial contact with DFEH to schedule an "intake" appointment. The complainant retained an attorney who interceded on her behalf and convinced DFEH to receive her complaint. However, by that time, more than one year had elapsed since the complainant's employment was terminated. The employer argued that DFEH was deprived of jurisdiction because the complainant did not file her complaint within the one-year statute of limitations.

The FEHC, in reliance upon decisions rendered by the U.S. Supreme Court interpreting Title VII, noted that the

> common rationale of these decisions is that the charging party typically comes to the filing process unrepresented and untutored in the law, and may therefore legitimately rely on the statements or conduct of the agencies authorized to enforce Title VII and similar state laws. Given this, and the fundamental purpose of these laws to provide remedy for discrimination, it would be unjust to permit mistakes by these agencies that lead to untimely filing to bar relief for innocent victims of discrimination.

Thus, the FEHC ruled that the failure to timely file a complaint may be excused when DFEH "itself, through no fault of the complainant, misleads the complainant about his/her filing obligations, commits errors in processing the raw complaint, or improperly discourages or prevents the complainant from filing at all." The complainant did all that a layperson could be expected to do, i.e., she contacted DFEH and relied upon the information imparted by its representative. Therefore, she could not be held liable and made to bear the consequences of not having a complaint on file within the applicable statute of limitations which, in this instance, would have been considerable. The employer/ respondent was found to have violated the FEHA and ordered to reinstate the complainant. She was awarded back and front pay, as well as compensation for emotional distress, incidental costs and attorney's fees.[29]

A complainant should be informed that, even if DFEH does not accept his/her complaint for the purpose of conducting an investigation, he/she is nonetheless entitled to file a "b" complaint and receive a right-to-sue notice with which he/she can pursue a remedy without DFEH's assistance.[30]

The courts and FEHC will not, however, grant equitable relief to a complainant who is apprised of his/her rights, but fails to take action to protect and preserve his/her right to seek a remedy.

Example: *The complainant alleged that she was subjected to discrimination because of her race and disability. She filed a complaint with DFEH alleging race discrimination in a timely manner. However, as to her claim for disability discrimination, she completed a pre-complaint questionnaire, but did not get her complaint on file until 14 months after her employment was terminated.*

The court found no basis upon which to equitably toll the statute so the complaint could be deemed to have been timely filed. She consulted with an attorney prior to the one-year statute of limitations and was notified by a DFEH staff member of the filing deadline. Therefore, the complainant failed to exercise due diligence to preserve her right to pursue her claims.[31]

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[29] See *DFEH v. Louis Cairo* (1984) FEHC Dec. No. 84-04.

[30] See DFEH Enforcement Division Directive 228.

[31] *Watson v. Chubb & Sons, Inc.* (2002) 32 Fed.Appx. 827. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

The statute of limitations may be equitably tolled in other circumstances where DFEH misleads the complainant about his/her obligation to file a complaint in order to preserve his/her rights, fails to properly process the complaint, as in the example discussed above, dissuades or prevents the complainant from filing a complaint.

Affirmative wrongdoing by the employer, over and above the unlawful practice which forms the basis for the complaint, may also give rise to equitable tolling. Examples include, but are not limited to actively misleading the complainant as to the true facts; concealing information from the complainant which, if known to him/her would apprise him/her of his/her right to and/or applicable time period within which to lodge a complaint with DFEH; actively misleading the complainant about the appropriate forum in which to file a complaint; or any other scenario under which the employer prevented the complainant from timely filing a complaint.

2. Verification of the Complaint

An aggrieved person may file a "verified" complaint in writing with DFEH. Verification is the legal term for the process of attesting to the accuracy, truthfulness or authenticity of a complaint.

a. Sworn vs. Unsworn Complaints

DFEH employs an "unsworn" verification format. The complainant declares under penalty of perjury that the facts set forth in the complaint are truthful and accurate by signing, dating and noting the place where those acts occurred. The test of the sufficiency of a verification format is whether the verbiage employed is clear and certain enough to sustain a criminal indictment for perjury if the information verified proves to be false.

The FEHA is silent on the question of whether complaints filed with DFEH must include a "sworn" verification.

The FEHC ruled, however, that an unsworn verification executed under penalty of perjury within the State of California is sufficient. A complaint executed outside of California may also contain an unsworn verification so long as it also sets forth the date of signing and a statement that the verification is made under the laws of the State of California. This is because

> the verification is for the benefit of the [DFEH]; its purpose is to assure [DFEH] that the complaint is made in good faith, so that it is not required to waste scarce resources investigating a complaint

only to discover that it is frivolous. Holding that omission of the place and date of verification of a complaint by the complainant deprives the Commission of jurisdiction to decide the merits of the case would not further this purpose. Indeed, no purpose would be served by dismissing an accusation in a case in which [DFEH] has waived the requirement of verification, investigated a complaint, and found it sufficiently meritorious to warrant issuing an accusation. Because [DFEH] conducts its own investigation of a complaint before issuing an accusation, respondent has suffered no prejudice from the complainant's omission of the date and place of execution of the verification.[32]

The FEHC also noted that any contrary ruling would contravene the mandate of Section 12993, subdivision (a), of the FEHA.

b. Verification by the Complainant's Counsel

An attorney may verify a DFEH complaint for his/her client so long as he/she signs his/her own name to the complaint. The attorney may not sign his/her client's name, i.e., the complainant's name.

Example: The complainant alleged that his employment was unlawfully terminated because of his age, race, disabilities, association with a person whose status was protected under the law and having taken family medical leave. The defendants asked the court to dismiss his civil action on the ground that he failed to exhaust his administrative remedies because his attorney verified the complaint.

The court noted that the plain language of section 12960, subdivision (b,) does not say that the complainant must personally verify the complaint and the complaint forms utilized by DFEH do not require that the individual who signs the complaint possess personal knowledge about the information set forth therein. Rather, the complaint form states that it is executed under penalty of perjury and "as to matters stated on my information and belief, . . . I believe it to be true." The signature line is labeled "Complainant's Signature."

The fact that the FEHA is to be construed liberally to achieve its stated goals compelled the court's conclusion that a complaint may be verified by the complainant's attorney. The whole purpose of verification is to assure that the statements verified or claims advanced are asserted in good faith. Attorneys are bound by ethical and legal guidelines. Therefore, an attorney's signature implicitly

[32] *DFEH v. Transcon Freight Co., Inc.* (1981) FEHC Dec. No. 81-02.

"attests to the good faith of the allegations and the client's concurrence in them."

> *In light of the directive to liberally construe the FEHA, we conclude that holding only an employee may verify a DFEH complaint would not serve the ends of justice. Protecting the victims of discrimination and giving notice to potential defendants may be as easily accomplished with an attorney verification. In our experience, most DFEH complaints are filed by plaintiffs before counsel is retained. However, the potential victim of discrimination should not be punished for retaining counsel.*

The court limited an attorney's authority to verify a complaint for his/her client by requiring that his/her sign his/her own name and cautioned counsel not to do so unless he/she believes "the allegations made therein to be true and they are acting in good faith as they are subject to penalties for perjury if they sign their name to DFEH complaints."[33]

3. Service of the Complaint

Section 12962 of the FEHA establishes the legal standard that employment complaints be served on the respondent in question either personally or by certified mail with return receipt requested. Service must be made at the time of initial contact with the respondent or within 60 days of the filing of the complaint, whichever occurs first.

a. Date of Service of the Complaint[34]

1) Personal Service

Service is deemed complete and effective when a copy of the complaint is personally delivered (handed) to the respondent or the respondent's legal counsel.

2) Substituted Service

Service is deemed effective when a second copy of the complaint is deposited into the U.S. mail, addressed to the respondent at the same location where the first copy was left for the respondent.

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[33] *Blum v. Superior Court* (2006) 141 Cal.App.4th 418.

[34] Code of Civil Procedure sections 1010-1013. See also DFEH Enforcement Division Directive 233.

3) Certified Mail

Service is deemed effective when a copy of the complaint is deposited into the U.S. mail, addressed to the respondent at the place where the respondent regularly receives mail.

b. Computation of the 60-Day Period

The 60-day period within which service must be completed is computed in the same manner as other time periods, i.e., by excluding the first day and including the last.

The date upon which the complaint is filed is deemed the first day, i.e., the date which triggers the running of the 60-day time period.[35]

Example: A complaint of employment discrimination was filed on June 1, 2007. The 60-day period began running the next day, June 2, 2007, and ended on July 31, 2007.

Therefore, the complaint had to be personally delivered to the respondent or placed in the U.S. mail for certified delivery on or before Tuesday, July 31, 2007.

Had the 60th day fallen on Saturday, Sunday or a legal holiday when the offices of DFEH were closed, the last day for service would have been extended to the next business day.[36]

c. Sufficiency of Service

DFEH is required to make repeated good faith attempts to serve the complaint upon the respondent(s), personally or via certified mail, within the 60-day statutory period in order to assure that the respondent(s)' right to due process is protected. If DFEH can demonstrate such effort, it will be deemed to have complied with its obligation to serve the complaint.

The law does *not* require that the respondent actually *receive* the complaint within the 60-day period.

The burden is upon DFEH to demonstrate that it either served the complaint upon the respondent(s) in accordance with the requirements outlined herein *or* made repeated good faith attempts to do so.[37] DFEH's

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[35] See DFEH Enforcement Division Directive 5.

[36] DFEH policy requires, however, that complaints be filed within two days of filing. (See DFEH Enforcement Division Directive 6.)

[37] See DFEH Enforcement Division Directive 233.

record-keeping policies and standards assure that DFEH will be able to sustain its burden.

For personal service and substituted service, an affidavit of service shall be completed and placed in the investigative file. If the complaint is served via certified mail, the green "return receipt requested" card is to be placed in the investigative file when it is delivered to DFEH by the U.S. Postal Service.[38]

4. Amending Complaints

A complaint may be amended during the one-year statute of limitation within which to file a complaint, i.e., within one-year of the last act of harm inuring to the complainant. The purpose of an amendment may be to make substantive changes to the original complaint or add allegations or parties.

Merely technical changes, e.g., to correct misspellings, places, dates, grammar or punctuation may be made at any time before or after the one-year statute of limitations.[39]

a. Assertion of a New or Additional Legal Theory

A complaint may only be amended to assert a new/additional legal theory of recovery after the one-year statute of limitations has elapsed if the theory is based upon or relates back to the same set of operational facts contained in the original complaint. After the one-year statute of limitations has run, a complaint may *not* be amended to add allegations arising out of a set of operational facts which are *different from* those set forth in the original complaint.

> *Example: The original complaint alleging a failure to hire because of race was filed within the one-year statute of limitations.*
>
> *More than one year after the complainant was denied an employment opportunity, i.e., not selected for the position in question, the complaint was amended to allege that the denial was because of the complainant's sex (gender).*
>
> *The respondent contended that the amendment was improper because the sex discrimination claim was untimely.*
>
> *If an additional protected basis is asserted after the statute of limitations has expired, the amendment will be deemed proper if based upon the same set of operative facts as the bases originally*

[38] See DFEH Enforcement Division Directive 208.
[39] See DFEH Enforcement Division Directives 207 and 208.

alleged. In such case, the amendment will be deemed to "relate back" to the original date of filing.

The facts, rather than the legal theory asserted, are the most critical factor evaluated by the FEHC and courts since the complainant may not be in possession of the information needed to assert all plausible legal theories at the time the original complaint is filed. So long as the complainant pleads the factual bases of his/her complaint, however, the legal theories of recovery may later be expanded via amendment of the complaint.[40]

b. Naming Additional Respondent(s)

As a general rule, a complaint may be amended to name an additional respondent after the one-year statute of limitations has elapsed *only* if that person or entity was mentioned in the original complaint as having committed the alleged unlawful employment act.

However, the rule is not absolute in its application. The FEHC and courts will evaluate whether a potential respondent will suffer real harm and actual prejudice as a result of not having been named in the original complaint. The respondent's interests will be balanced against the complainant's right to seek full redress of all claims and obtain a recovery from all persons and entities responsible for the harm he/she suffered.[41] Among the factors to be taken into account are the respondent's actual notice of the filing of the complaint and whether he/she participated in the investigation. In such instances, the FEHC and court will allow the respondent to be named given that it is unlikely that he/she suffered or will suffer any harm as a result of not being provided formal notice.[42]

c. Naming Additional Complainant(s)

A complaint alleging a violation of the Unruh Civil Rights Act or the housing provisions of FEHA may be amended after the statute of limitations has expired to name an additional complainant *only* if the set of operational facts included in the original complaint indicated that the complainant is an aggrieved party.

<u>Example</u>: The narrative portion of a complaint utilizes the term "we" to describe the aggrieved persons seeking relief.

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[40] *DFEH v. County of Alameda, Sheriff's Department* (1981) FEHC Dec. No. 81-13.
[41] *DFEH v. American Medical International, Inc.* (1986) FEHC Dec. No. 86-13, pp. 7-11; *DFEH v. Del Mar Avionics* (1985) FEHC Dec. No. 85-19, p. 10.
[42] *DFEH v. La Victoria Tortilleria, Inc.* (1985) FEHC Dec. No. 85-04, 11-13.

However, only one complainant is actually named and executes the complaint.

Since the set of operational facts included in the original complaint unequivocally indicate that more than one person was purportedly harmed by the unlawful acts alleged therein, the complaint may be amended after the one-year statute of limitations has elapsed in order to identify additional complainants by name.

Example: The narrative portion of a complaint utilizes the term "I" to describe the aggrieved person seeking relief.

However, only one complainant is actually named and executes the complaint.

Since the set of operational facts included in the original complaint unequivocally indicates that only one person was purportedly harmed by the unlawful acts alleged therein, the complaint may not be amended after the one-year statute of limitations has elapsed in order to identify additional complainants by name.

5. Investigative Determination

Government Code section 12963.7, subdivision (a), provides that if DFEH "determines after investigation that the complaint is valid, the department shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion." However, "[i]n the case of failure to eliminate an unlawful practice . . . through conference, conciliation, or persuasion, or in advance thereof if circumstances warrant, the director in his or her discretion may cause to be issued in the name of the department a written accusation."[43]

A failure to make an investigative determination of merit and notify the respondent(s) of its findings does *not* deprive DFEH of jurisdiction to proceed with issuing an accusation, since the Legislature has granted it "wide discretion" in the manner it exercises its powers.

> While common sense suggests that the Department will have concluded that a complaint has merit before issuing an accusation, there is no jurisdictional requirement that the Department make a formal finding to this effect or that it so notify the respondent. (Citation omitted.) Neither is there any jurisdictional requirement that the Department, in each instance, engage in conciliation efforts, formally or informally, before issuing an accusation. The Department may issue an accusation without any efforts

[43] Gov. Code, § 12965, subd. (a).

at conciliation where it determines that the “circumstances warrant” that course.[44]

Moreover, although DFEH policy provides that it will engage in conciliation efforts “on *every* case where there is probable cause to believe a violation occurred, except in rare situations,”[45] such effort is *not* a mandatory prerequisite to the issuance of an accusation. Rather, DFEH may issue an accusation without engaging in conciliation when, in its discretion, "circumstances warrant".[46]

6. Statute of Limitations within Which to Issue an Accusation

“For any complaint alleging a violation of Section 51.7 of the Civil Code, an accusation shall be issued, if at all, within two years after the filing of the complaint. For all other complaints, an accusation shall be issued, if at all, within one year after the filing of a complaint.”[47]

The statute of limitations is strict, i.e., it may *not* be extended and is *not* subject to equitable tolling.[48] If DFEH does not issue an accusation prior to expiration of the statute of limitations, it loses jurisdiction over the complaint and the case cannot proceed to a hearing.

The statute of limitations is two years when a complaint is filed as part of a group or class.[49] A complaint may be converted to a group or class complaint when circumstances, in the opinion of the Director, warrant it. In such instances, the statute of limitations will be extended to two years because, from that point forward, the complaint will, for all purposes, be treated as a class complaint for all purposes.[50]

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[44] *DFEH v. Hoag Hospital* (1985) FEHC Dec. No. 85-10, p. 8. See also *Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 209; *Mahdavi v. Fair Employment Practices Commission* (1977) 67 Cal.App.3d 326.

[45] DFEH Enforcement Division Directive 401.

[46] The FEHC and courts encourage DFEH to engage in conciliation efforts and, whenever possible, resolve disputes without resort to hearing or trial as a matter of public policy and conservation of scarce taxpayer resources. However, even though one court has suggested, in dicta, that DFEH expend “maximum effort” to successfully conciliate complaints, it also observed that the Legislature did not specifically deprive DFEH or FEHC of jurisdiction when conciliation is not attempted and that to interpret the FEHA in that manner would leave the aggrieved party “helpless to prevent in any way the complete denial of his right” to pursue a remedy. *Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 209, citing *Liberty Mut. Ins. Co. v. Industrial Acc. Commission* (1964) 231 Cal.App.2d 501, 510.

[47] Gov. Code, § 12965, subd. (a).

[48] *DFEH v. Ametek. Pacific Extrusion Division* (1980) FEHC Dec. No. 80-11, pp. 4-7.

[49] Gov. Code, § 12965, subd. (a).

[50] Gov. Code, § 12961.

There is only one other circumstance under which the statute of limitations can be extended. The filing by DFEH of a petition for an order compelling compliance with the attendance and testimony of witness(es), production of books, records and/or documents and physical materials, and/or a response to interrogatories.[51]

Computation of the Statute of Limitations

The one-year time limit is calculated in the same manner as all other time periods are computed: The year begins to run the day after the complaint is filed and ends 365 days later.

> *Example: A complaint was filed on September 1, 2006. Thus, an accusation would normally have to be issued, if at all, not later than September 1, 2007. However, if the last date to issue the accusation falls on a Saturday, Sunday or legal holiday when DFEH's offices are closed, the deadline is extended to the next business day.*
>
> *September 1, 2007 was a Saturday. The accusation would ordinarily have to be issued not later than the next business day, Monday, September 3,* 2007.
>
> *However, that Monday was Labor Day, a legal holiday when DFEH's offices are closed. So in this instance, the accusation had to have been filed not later than Tuesday, September 4, 2007.*

An accusation is "issued" when DFEH mails it to the respondent via certified mail. In other words, the date of issuance is the day the accusation is deposited into the U.S. mail.[52]

7. Specific Circumstances under Which DFEH Lacks Jurisdiction

A State agency cannot exert jurisdiction over a federal agency, division or entity such as the U.S. Postal Service, branch of the military or its installations, federal parks situated within California (e.g., Yosemite, Lassen or Alcatraz Island), the federal courts or legislative branch.

a. Federal Enclaves

A federal enclave is "land over which the federal government exercises legislative jurisdiction."[53] The United States Constitution grants Congress

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[51] Gov. Code, § 12963.5, subd. (a); *DFEH v. La Victoria Tortilleria, Inc.* (1985) FEHC Dec. No. 85-04, p. 8-11.
[52] Cal. Code Regs., tit. 2, § 7406, subd. (b); Cal. Code Regs., tit. 2, § 7408, subd. (b)
[53] *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, citing *Kelly v. Lockheed Martin Services Group* (1998) 25 F.Supp.2d 1, 3.

the authority to exercise exclusive authority when land is purchased by the federal government with the consent of the legislature of the state in which the land is situated. Thus, a federal enclave is created when the federal government purchases land, with the consent of the state's legislature, for its use. The voluntary transfer of ownership from the state to the federal government constitutes a transfer of sovereignty.[54] Accordingly, even though the land in question is physically located within one of the fifty states, it belongs to the federal government.

Once a property becomes a federal enclave, Congress obtains exclusive authority to pass legislation to which it is subject. The general rule is that any state law in effect at the time the federal government takes ownership of the land which is "not inconsistent with federal law, will continue to apply within the enclave unless it is abrogated by Congress."

Additionally, any state law(s) which were not in existence at the time the federal government took ownership will be applicable to the enclave only if the state statute or regulation is expressly permitted by Congress.

The result is that a complainant may "assert claims authorized by federal law, by any California law not in conflict with federal law that existed when [the property] became a federal enclave . . . and only subsequently enacted state law to the extent authorized by Congress."[55]

> *Example: An African-American complainant was employed as a rocket engine mechanic by a civilian contractor providing launch operations services at Vandenberg Air Force Base. He filed a complaint with the Division of Occupational Safety and Health of the Department of Industrial Relations (Cal/OSHA), claiming that he was improperly protected from chemicals used in the workplace. Cal/OSHA's investigation concluded that his complaint was meritorious, resulting in citations being issued to the employer.*
>
> *Thereafter, the complainant was placed on an unpaid suspension without a definite return date. He contended his employment was constructively terminated because of his race and in retaliation for his complaint to Cal/OSHA, while his employer argued that his suspension was motivated by "unresolved issues relating to his work performance."*
>
> *The court found that Vandenberg Air Force Base is situated within California, but on land purchased by the U.S. Department of the Army in 1941. The federal government took jurisdiction over the*

[54] "Sovereignty" refers to the supreme and independent power or authority to regulate the affairs of the particular location in question.

[55] *Taylor v. Lockheed Martin Corporation* (2000) 78 Cal.App.4th 472, 481-82.

property in January 1943 and granted authority to the U.S. Air Force in 1957. Therefore, it is a federal enclave.

The employer presented evidence which was undisputed by the complainant establishing that he was assigned to work and subjected to workplace discipline on the federal premises. Accordingly, since the complainant was employed by "a contractor operating on the enclave, [his] claims [were] governed by the enclave's law, rather than by state law."

The complainant's claims were based solely upon section 12940 of the FEHA which was enacted in 1980 and its predecessor statute, the Fair Employment Practices Act was enacted in 1959. Therefore, neither statutory scheme was in existence when the federal enclave came into being. Moreover, Congress has not specifically authorized FEHA claims against employers operating on federal enclaves situated within California.

Therefore, the court dismissed his claims since they fell outside the jurisdiction of the California courts.[56]

Example: The complainant was employed as a cook at a hotel situated within Yosemite National Park. The hotel, a national historic structure also owned by the United States government, was operated by a concessionaire under authority granted it by the National Park Service.

The complainant was a person with a physical disability (paraplegia) with limited mobility who utilized an assistive device, a wheelchair. He was selected by his supervisor to attend a "General Manager's Forum" at which employee complaints and grievances would be discussed.

When he arrived for the meeting, he learned that it was taking place on the second floor of the hotel and the building did not have an elevator. He contended that the hotel's manager, upon learning that the meeting location was inaccessible to the complainant, refused to change the location to accommodate the complainant. Rather, the manager offered to carry the complainant up the stairs in his wheelchair, arguing that there were no other meeting rooms available.

Yosemite Valley was given to the federal government by the State of California in 1905 and the remainder of Yosemite National Park was transferred in 1920. "Sole and exclusive jurisdiction is assumed by

[56] *Taylor v. Lockheed Martin Corporation* (2000) 78 Cal.App.4th 472.

the United States over the territory embraced and included within the Yosemite National Park and Sequoia National Park, . . ." (United States Code Annotated section 57.) Three exceptions to the federal government's exclusive use and control were reserved: 1) the service of criminal and civil process related to acts occurring outside the Park; 2) the ability of the State of California to fix and collect taxes; and 3) California's right to establish and collect fishing license fees. In all other matters and respects, the United States was given control and authority over the Park itself and all activities therein.

Congress did not set forth any exception to the federal government's jurisdiction for the "exercise of the police power of the state for the protection of the welfare, health, and peace of the people . . ." of California. And the transfer of ownership to the federal government predated the enactment of the FEHA.

Therefore, DFEH has no jurisdiction to "receive, investigate, and conciliate complaints alleging practices. . ." which took place within Yosemite National Park. It is "subject only to control by the United States" which has "sole and exclusive jurisdiction" with regard to any claimed acts of discrimination occurring there.

Accordingly, the complaint was dismissed.

b. Casinos or Gaming Establishments Owned by Tribes

DFEH lacks jurisdiction when the complainant was employed by a casino or other entity that is owned and operated by a Native American tribe.

The doctrine of sovereign immunity is well established under both federal and State law. It provides that Native American tribes are immune from suit unless Congress expressly consents or the tribe expressly waives its immunity.[57] Congress has not expressly consented to the application of the FEHA to federally recognized Native American tribes and, absent such consent, the State would have to obtain an unequivocally expressed waiver of sovereign immunity in order to enforce the FEHA against a particular tribe.[58] Such waiver cannot be implied, and any limitation on the waiver will be strictly construed and applied with any ambiguity resolved in favor of the tribe.

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[57] *U. S. v. U. S. Fidelity & Guar. Co.* (1940) 309 U.S. 506; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49; *Puyallup Tribe, Inc. v. Department of Game of State of Wash.* (1977) 433 U.S. 165; *In re Greene* (9th Cir. 1992) 980 F.2d 590; *Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269.

[58] *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (1985) 170 Cal.App.3d 489, 494-495.

If a tribe enters into a contract with the State of California for the provision of goods, services or public works, it may subject itself to the State's jurisdiction. The exact language of the contract must be examined. For instance, if the contract merely provides that the tribe agrees to abide by the FEHA or other California laws, it will not be deemed to have waived its sovereign immunity.[59]

Example: The complainant was employed by a casino and resort owned and operated by a Native American tribe. She contended that she was subjected to unlawful discrimination because of a mental disability (depression).

The complainant had been employed as a card dealer in the casino for approximately eight years when she was diagnosed with chronic depression and attention deficit disorder without hyperactivity (ADD). Upon the advice of her treating physician, she commenced a medical leave in late July. She provided the casino's human resources department with written documentation of her need for leave. When her leave period was extended by her doctor, she again provided written substantiation of the estimated date of her return to work.

When she did not receive a response from her employer, the complainant placed numerous calls to the human resources department. Eventually, she was informed that the casino had modified its leave policy during her absence and she would not be allowed to resume her duties. Her employment was terminated.

The casino asserted that DFEH had no jurisdiction to receive, investigate or conciliate the complaint because is was owned and operated by a federally recognized Native American tribe, in addition to the fact that the casino and resort facilities are situated on federally-designated reservation land. The casino argued that was exempt from Title VII, the Americans with Disabilities Act (ADA) and the FEHA. It also maintained that the tribe had not waived its sovereign immunity. Accordingly, DFEH lacked jurisdiction to proceed and the complaint was dismissed.

Example: The complainant was employed by a corporation formed by a group of federally recognized Native American tribes for the purpose of providing health services to Native Americans. She served as a substance abuse counselor until her employment was

[59] *Hagen v. Sisseton-Wahpeton Community College* (8th Cir. 2000) 205 F.3d 1040, 144, FN2. [Certificate of assurance lodged with Department of Health and Human Services that Native American college agreed to abide by Title VII was not a waiver of immunity with respect to future discrimination lawsuits.]

terminated. She claimed that she was subjected to discrimination because of her sex (gender) and denied pregnancy disability leave.

The employer contended that the complainant's employment was terminated due to a lack of adequate funding. Moreover, it claimed immunity from application of the FEHA due to its sovereignty, arguing that ten tribes established the corporation for the purpose of providing a rural health care system to Native Americans.

The fact that the tribes in question came together to form a non-profit corporation did not destroy their sovereign immunity. Each tribe designated two members to serve on the corporation's board of directors which, in turn, elected the corporate officers. Since there was no evidence of a clear and explicit waiver of immunity, DFEH did not have jurisdiction over the complaint.

c. Exhaustion of Remedies in Other Forums

Generally, a complainant is *not* required to exhaust remedies available to him/her in another forum before filing a complaint with DFEH.[60] However, the complainant's act of seeking relief in another forum or venue will not serve to toll or extend the applicable statute of limitations for filing a complaint with DFEH.

Complaints alleging the same or similar claims filed in different forums or with more than one agency may be pursued simultaneously except under specific circumstances.

Example: The complainant contends that he was subjected to unlawful discrimination because of his race (African-American) and color (black). He lodged a grievance with the collective bargaining unit of which he is a member as well as with EEOC prior to filing a complaint with DFEH. The grievance was decided in the employer's favor and EEOC concluded that it did not have jurisdiction to conduct an investigation because the employer only employs ten persons (the jurisdictional minimum under Title VII is 15 and 20 pursuant to the ADEA).

The respondent employer argues that DFEH has no jurisdiction to receive, investigate and conciliate the complaint because the complainant filed the grievance and EEOC complaint previous to lodging his complaint with DFEH.

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[60] *DFEH v. City of Modesto* (1979) FEHC Dec. No. 79-17, p. 3; *DFEH v. Hubacher Cadillac/SAAB, Inc.* (1981) FEHC Dec. No. 81-01, pp. 12-13; *DFEH v. City of San Jose* (1984) FEHC Dec. No. 84-18, p. 10; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861.

The fact that the complainant availed himself of his right to be heard in other forums or venues prior to lodging a complaint with DFEH does not deprive DFEH of jurisdiction. The contractual terms addressed during the grievance proceeding and federal laws under which EEOC operates are separate and apart from the laws enforced by DFEH. Therefore, DFEH may proceed with its investigation and, if it determines that the complaint is meritorious, litigation against the respondent.

Some employment relationships are governed by an employment agreement (written, oral or implied) that requires the employer and employee to submit their dispute to arbitration (binding or nonbinding). Even if a complainant has already participated in arbitration prior to filing his/her complaint with DFEH, DFEH will not be prohibited from receiving and investigating the complainant's allegations. DFEH also retains jurisdiction to conciliate and litigate the case because it was not a party to the arbitration and, therefore, did not previously have an opportunity to vindicate the public policies embodied in the FEHA. However, DFEH cannot secure a duplicate remedy on behalf of the complainant.[61]

"Res judicata" is the legal concept which prevents duplicate recovery. It is comprised of two principles.

1) "Claim preclusion" bars a lawsuit from being based upon legal causes of action that were fully and fairly adjudicated in a previous suit, i.e., the causes of action to which the same persons or entities were parties were already decided. Each separate violation of the FEHA constitutes a claim.

2) "Issue preclusion" or "collateral estoppel" prohibits the re-litigation of factual issues that were, of necessity, already decided by a judge or jury.

There are times when DFEH will decline to exercise its jurisdiction, such as when the complainant exercised his/her right to seek relief in another forum or venue prior to filing a complaint with DFEH. Other times when DFEH might decline to exercise jurisdiction include:

[61] See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, fn. 6: "An arbitration agreement does not 'restrict an employee's resort to' DFEH or prevent it "from carrying out its statutory functions" when it was not a party to the agreement in question." DFEH staff should consult with a DFEH Legal Division Staff Counsel upon learning that a complainant has participated in arbitration with his/her employer or the employer asserts that the complainant is required, under the terms of an employment agreement, to participate in arbitration.

1) A finding adverse to the complainant has been made in the other forum or venue

2) A remedy has been awarded to the complainant in the other forum or venue

3) The complainant and respondent entered into a settlement agreement that bars the complainant from later litigating the same claim(s) and the act of doing so may subject to the complainant to damages.[62]

<u>Example</u>: The complainant, a Quality Assurance Application Engineer for a large credit corporation, contended that he was denied California Family Rights Act (CFRA) leave and his employment terminated. Sixteen days before he signed his DFEH complaint, the complainant entered into a "Separation Agreement" with his former employer which included the following terms:

a) The date upon which his employment terminated;
b) Complainant received payment representing net wages and benefits for a period of six weeks following his separation from employment;
c) Complainant waived his rights under California Civil Code section 1542, which states:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

d) The agreement constituted a "full and complete settlement, payment and satisfaction of, . . . any and all claims . . ." under any "discrimination or employment law" including the FEHA and CFRA.
e) Complainant expressly agreed that he would "neither file nor benefit from any legal action, agency charge, . . . including any suit or claim under any federal, State or local discrimination law, and "waive and release any right to any remedy in any agency or proceeding." That portion was deemed "material" and a violation of its terms could, according to the written agreement, result in forfeiture by the complainant of "all benefits" received under the

[62] See DFEH Enforcement Division Directive 211.

agreement and result in his being ordered to pay the employer's attorney's fees and costs.

f) The complainant acknowledged having "the opportunity to consult with family and advisors" of his choice before entering into the agreement.

The agreement was clear, unambiguous and established that, by signing it, the complainant forever waived his right to "lodge or benefit" from a complaint filed with DFEH arising out of his employment and existing as of the date he signed the agreement. There was no evidence that the complainant was coerced to enter into the agreement.

DFEH could proceed with an investigation into the facts presented in the complaint, given that it was not a party to the settlement agreement and, therefore, not bound by its provisions. However, even if the evidence adduced revealed violations of the FEHA, no relief could be obtained for the complainant because, under the terms of the settlement agreement, he has already received relief. The only forms of relief available to DFEH would be affirmative and injunctive.

Under such circumstances, DFEH may determine that, absent evidence of systemic discrimination, harassment or retaliation by the respondent, its resources should not be invested in pursuing an investigation when no relief can be obtained for the individual complainant and, accordingly, exercise its statutory discretion to issue the complainant a right-to-sue notice and close its file.

d. Exclusions from "Employer"

Religious Entities and Their Employees

In 1999, the California Legislature amended the FEHA[63] by adding two sections clarifying the scope of the jurisdictional exemption granted to religious entities.

A "religious corporation" is defined in Government Code section 12926.2, subdivision (a), as a corporation "formed primarily or exclusively for religious purposes" either under California law or "the laws of any other state to administer the affairs of an organized religious group and that is not organized for private profit."

Included within the FEHA's definition of "employer" are religious associations or corporations whose employees "perform duties, other

[63] Assembly Bill No. 1541 (1999-2000 Reg. Sess.), Stats. 1999, ch. 913, §§ 1, 2.

than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation."[64] The California Supreme Court has interpreted this section of the FEHA to mean that the exemption is only "intended to apply to hospitals with a religious affiliation and motivation."[65]

A religious corporation may "restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized."[66] Section 12926.2, subdivision (b), defines "religious duties" as those "duties of employment connected with carrying on the religious activities of a religious corporation or association." The religious exemption from the FEHA applies to "a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care"[67] or concerning "the promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care."[68]

> *Example: A hospital is owned and operated by a religious organization, formed in accordance with the applicable laws of California. The hospital's employees perform a wide range of duties, including patient care, which the hospital provides to members of the public, not just persons who are members of the same religious denomination. The hospital also employs persons who have been ordained as ministers by the religious denomination to serve in the position of "chaplain" performing duties such as visiting and praying with patients, leading worship in the hospital chapel, and recording weekly religious messages which are broadcast via the hospital's public address system at specific times.*
>
> *DFEH has jurisdiction over the hospital with regard to a complaint of discrimination filed by an employee whose duties are not specifically religious in nature. So, for instance, if a nurse complains that she has been subjected to discrimination because of her race, DFEH has jurisdiction to receive and investigate her claim.*
>
> *However, DFEH does not have jurisdiction to receive or investigate a complaint of discrimination filed by an employee who performs*

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[64] Gov. Code, § 12926.2, subd. (c).
[65] *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, citing *Kelly v. Methodist Hospital of Southern Cal.* (2000) 22 Cal.4th 1108, 1121-25.
[66] Gov. Code, § 12922.
[67] Gov. Code, § 12926.2, subd. (d).
[68] Gov. Code, § 12926.2, subd. (e).

religious duties such as proselytizing or teaching about the religious denomination's beliefs or practices. Therefore, DFEH would not have jurisdiction over a complaint alleging discrimination because of age filed by a chaplain because the position exists to perform religious duties, including pastoral care.

Because of the managerial functions performed, the hospital may require its executives to be members of the religious denomination or organization which owns and operates the hospital. If so, DFEH would not have jurisdiction over a complaint of discrimination filed by, for example, the hospital's administrator, but would have jurisdiction over a complaint filed by a non-managerial employee whose duties are not religious in nature.

When a respondent contends that DFEH does not have jurisdiction to proceed with its investigation into a complaint of discrimination, the respondent bears the burden of demonstrating that it is entitled to the religious exemption. Such showing is made by providing to DFEH copies of the articles of incorporation it lodged with the Secretary of State (in the state of incorporation) and corporate or association bylaws.[69]

The religious exemption from the FEHA applies to employees of the religious entity, as well as the entity itself. Although employees may not be held individually liable for the employer's acts of discrimination, as explained above, they may be held liable for their own acts constituting workplace harassment in accordance with Government Code section 12940, subdivision (j)(3), *if* they are "[a]n employee of an entity subject to" that subdivision. Pursuant to subdivision (j)(4)(B), the operative definition of "employer" vis-a-vis harassment "does not include a religious association nor corporation not organized for private profit, except as provided in section 12926.2." Thus, the employees of an exempt religious entity are also exempt. DFEH has no jurisdiction over complaints naming them as respondents.

<u>Example</u>: The complainant was employed as a youth and adult minister at a church. She claimed that the pastor subjected her to offensive touching when she went to his office for "private and personal counseling" which constituted sexual harassment in violation of the FEHA. She filed a complaint naming both the pastor and church as respondents. Both contended that DFEH had no jurisdiction in the matter due to the religious exemption. Specifically, the pastor claimed that since he was employed by an exempt religious entity at the time the conduct complained of occurred, he was also exempt from individual liability for his behavior.

[69] Those documents will be provided to DFEH's Legal Division which will render an opinion as to whether or not the entity in question qualifies for the religious exemption.

The court agreed, finding that the church was an exempt entity and the pastor could not be held liable for his own conduct because he was not employed by "an entity subject to" Government Code section 12940, subdivision (j)(3). Therefore, he was not "covered by the subsection making employees liable for harassment." The court's analysis of the statutory language led it to the conclusion that "the Legislature did not intend to allow for the imposition of personal liability for harassment on employees of employers that fall under the religious entity exemption contained in subjection (j)."[70]

C. Substantive Considerations

1. Complainants

Pursuant to section 12960, there are nine categories of persons who may file complaints with DFEH:

- Persons claiming to be aggrieved by an alleged unlawful practice because of his/her protected status
    - ♦ Employees
    - ♦ Partners and shareholders
    - ♦ Job applicants
    - ♦ Victims of disparate treatment
    - ♦ Victims of adverse impact discrimination
    - ♦ Victims of retaliation
- Persons claiming to be aggrieved by an alleged unlawful practice because of his/her relationship with another person who is protected
    - ♦ Association with protected persons
    - ♦ Victims of bystander harassment
    - ♦ An organization or association claiming to be aggrieved by an alleged unlawful practice
- The Director of DFEH
- Employers
- The complainant's attorney

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[70] *Taylor v. Beth Eden Baptist Church* (2003) 294 F.Supp.2d 1074. [The court appears to have assumed, without further analysis of the FEHA's plain language, that an employment relationship is a prerequisite to the imposition of liability upon an individual for his/her own conduct. See discussion above.]

- The complainant's guardian ad litem
- A decedent's estate
- A collective bargaining unit/union
- Organizations or associations

a. Person Claiming to be Aggrieved by an Alleged Unlawful Practice Because of His/Her Protected Status

The FEHA's definition of "person" is extremely broad:

> [O]ne or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

Accordingly, individuals, as well as organizations (e.g., collective bargaining units, community groups or councils) have standing to file a complaint, if subjected to unlawful discrimination, harassment or retaliation.

"Aggrieved" means "wronged, offended, injured or deprived of legal rights or claims." Thus, a "person" may file a complaint if the individual or entity contends that it has been harmed by conduct that is unlawful or denied the right to work in an environment free from conduct that is prohibited by the FEHA.

1) Employees

An "employee" is defined as "[a]ny individual under the direction and control of an employer under any contract of hire or apprenticeship, express or implied, oral or written."[71] Accordingly, an employee is an individual who is:

- Appointed;
- Hired under an express or implied contract; or
- An apprentice.

a) Temporary vs. "Permanent" Employees

Both temporary and permanent employees may file complaints with DFEH. A temporary employee is distinguishable from an

[71] Cal. Code Regs., tit. 2, § 7286.5, subd. (b).

employee of a temporary agency. An individual who is "compensated by a temporary service agency may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer."[72] However, the individual is an employee of the agency only with regard to the terms, conditions and privileges of employment, which are "under the control of the temporary service agency."

b) Exclusions from "Employee"

(1) Independent contractors

Independent contractors are *only* protected under the FEHA with regard to workplace harassment.[73] Government Code section 12940, subdivision (j)(4)(A), defines an "employer" as any person "regularly receiving the services of one or more persons providing services pursuant to a contract, . . ." Therefore, the following criteria must be met:

(a) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
(b) The person is customarily engaged in an independently established business.
(c) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.[74]

Independent contractors are *not* included within the definition of "employee" as to other provisions of the FEHA.[75] The respondent bears the burden of establishing, in order to defeat DFEH's jurisdiction, that the worker in question was not an employee but was, rather, an independent contractor.[76]

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[72] Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(5).
[73] Gov. Code, § 12940, subd. (j)(4)(A). "Employee does not include an independent contractor as defined in Labor Code Section 3353." (Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(1).)
[74] Gov. Code, § 12940, subd. (j)(5)(A).
[75] Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(1); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608, fn. 6.
[76] *Fisher v. San Pedro Peninsula Hosp*. (1989) 214 Cal.App.3d 590, 608-609, fn. 6.

Whether an individual is an independent contractor or employee is a fact-specific inquiry, governed by the unique circumstances of the particular case. The FEHC and courts consider a number of factors under the "multi-factor" or "economic realities" test, the most important being who has the right to control and direct the individual's work.[77] Stated differently, the facts must be reviewed to determine "whether the principal to whom the service is rendered has the right to control the manner and means of accomplishing the result desired." Among the other factors to be analyzed are:

(a) Whether the one performing service is engaged in a distinct occupation or business;
(b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
(c) The skill required in the particular occupation;
(d) Whether the principal or worker supplies instrumentalities, tools, and the place of work for the person doing the work;
(e) The length of time for which the services are to be performed;
(f) The method of payment, whether by the time or by the job;
(g) Whether or not the work is a part of the regular business of the principal;
(h) Whether or not the parties believe they are creating the relationship of employer-employee.[78]

The California Supreme Court stated that "the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Thus, five "related" factors enunciated by the Court are:

(a) The alleged employee's opportunity for profit or loss depending on his managerial skill;
(b) The alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
(c) Whether the service rendered requires a special skill;

[77] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349.
[78] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351.

(d) The degree of permanence of the working relationship;
(e) Whether the service rendered is an integral part of the alleged employer's business.[79]

Example: The complainant was a newspaper route carrier for seven years until he was injured in a motor vehicle accident. He and the newspaper publisher entered into a preprinted written contract which containing the following verbiage: "It is the specific and express intention of the parties to establish by this agreement the relationship of independent contractor and contractee. The parties expressly disavow any intention to create or establish by this agreement the relationship of . . . employer and employee." The complainant was free to deliver other publications and liable for all operating costs, including supplies other than rubber bands and plastic wrappers, and utilize his own vehicle to make deliveries. Both parties were required to give the other two weeks' notice of termination of the agreement. After the complainant entered into a subsequent "transportation hauler agreement" with the publisher, he was also responsible for transporting newspapers from the plant to the site where all carriers picked up the papers to be delivered each morning. Complainant was paid a flat rate for each route to which papers were delivered each day. Payments were made biweekly. The publisher established the times by which the newspapers were to be delivered. The identity of existing customers and precise routes to be used when delivered papers were provided by the publisher, and customers directed complaints about delivery service to the publisher. The carriers were not responsible for the cost of lost or undelivered papers.

Applying the factors enumerated above, the court found that the complainant was an employee, not an independent contractor. He had little control over the "mode and manner in which he performed his service." The publisher dictated the times papers were to be picked up and delivered; furnished the customers and routes to be utilized; received and responded to delivery complaints, and collected subscription fees; the contract required two weeks' notice of termination of the relationship, but the only financial consequences inured to the carrier which was required to pay the publisher two weeks'

[79] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 355.

compensation if he/she failed to provide the requisite notice. The publisher, in contrast, bore no financial burden for discharging a carrier "on the spot" which it acknowledged doing. The publisher retained ownership of the papers until they were delivered and did not charge carriers for lost or misdelivered papers. The only tools required to perform the services, rubber bands and plastic covers, were provided by the publisher. Provision of the services in question required no special skill or expertise, and the carrier's compensation was not dependent upon "his initiative, his judgment or his managerial abilities. He merely had to deliver all the newspapers on the route. There was only one way to deliver the newspapers, and all the carriers performed their function essentially in the same manner." The provision of services was ongoing and permanent, rather than for a finite time period.[80]

Example: The complainant was the Clinic Administrator/Office Manager for an urgent care facility. She had "overall supervisorial responsibilities and was responsible for the payroll and other financial matters." She reported to the owner. After a period of time, the two decided complainant should become the organization's Marketing Director, even though she had no prior experience in that capacity. Her performance was dismal. After a period of six months, she failed to bring in new clients and the owner determined to terminate her employment.

In the interim, another employee complained that her employment was terminated because a perceived disability. The owner asked the complainant to submit a response to the former employee's DFEH complaint. But the complainant did not feel that she could include the verbiage requested by the owner in her statement as it was untruthful. When she advised the owner of her stance, he became "loud and disruptive," directing her in a profane manner to leave the meeting. She contended that her employment was later terminated in retaliation for her refusal to make a false statement to DFEH in conjunction with its investigation of the former employee's complaint.

The owner argued that the complainant was an independent contractor, not an employee, thus DFEH had no jurisdiction over her complaint. He asserted that when

[80] *Gonzalez v. Workers' Compensation Appeals Bd.* (1996) 46 Cal.App.4th 1584.

the complainant assumed the position of Marketing Director, her employment status changed. Specifically, he discontinued withholding taxes from her paycheck, treating her for tax purposes as an independent contractor. The complainant also believed that she was an independent contractor and, based upon that understanding, sold back support belts for personal profit while making calls on clients on behalf of the urgent clinic.

The FEHC noted at the outset that the parties' belief that the complainant was an independent contractor was "only one factor to be considered," reiterating that the most important indicator of an employment relationships is "the right to control and direct the individual who performs the services as to the details and means by which the result is accomplished."

The complainant was deemed an employee for jurisdictional purposes after weighing the relevant factors. The complainant "had no specialized skills or prior experience in marketing and worked directly under the control and supervision of" the owner and clinic administrator. Even though she spent most of the workday in the field, she was required to punch a time clock, as well as meet with one or both of her supervisors every morning and afternoon to review her planned and actual activities. She was directed to maintain a log listing every client she contacted and whether the contact was by telephone or in person. She had an office within the urgent care facility, and was paid a salary in addition to commission. She was also subject to a reduction in salary if she did not work her normal work schedule. Like all of the clinic's employees, she was required, after becoming the Marketing Director, to pass a 90-day probationary period before attaining permanent status. Thus, the FEHC concluded that "in everything but name only, complainant was, in fact, an employee of respondent and we will treat her as such."[81]

<u>Example</u>: A female barber complained that she was subjected to workplace harassment and discrimination consisting of crude gender-based commentary, unwelcome touching, and being forced to view sexually explicit magazines kept in the workplace by her supervisors.

[81] *DFEH v. Los Angeles Airport Urgent Care* (1996) FEHC Dec. No. 96-02.

The employer defended, in part, on the ground that the complainant was an independent contractor. The FEHC rejected that argument, finding that the salon controlled and direct the individual barbers and stylists, including the complainant, with regard to the manner and means by which they were to perform their assigned duties.

The salon managers referred to the staff as "employees," established the price to be charged customers for haircuts and other salon services, required staff to attend mandatory meetings, set staff working hours, subjected employees to discipline if they reported late for work, implemented and maintained sale rules and policies, limited employees' telephone access and usage, and required employees to remain in the salon until being granted permission to leave.[82]

(2) Volunteers

Non-compensated volunteer workers are not subject to the FEHA's protections. Workers who volunteer their services without receiving remuneration do not fall with the three broad classifications established in the FEHC's Regulations.

Following federal law, the California courts have ruled that "compensation of some sort is indispensable to the formation of an employment relationship."[83] The federal courts have found that "Where no financial benefit is obtained by the purported employee . . . no 'plausible' employment relationship of any sort can be said to exist . . ."[84] Factors which are "indicative of 'financial benefit'" include:

(a) Salary or wages;
(b) Employee benefits such as health insurance;
(c) Vacation;
(d) Sick pay; and
(e) The promise of any of the above.[85]

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[82] *DFEH v. Sid's Barber and Style Salon* (1987) FEHC Dec. No. 87-33, p. 7.
[83] *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625.
[84] *York v. Association of Bar of City of New York* (2nd Cir. 2002) 286 F.3d 122.
[85] *York v. Association of Bar of City of New York* (2nd Cir. 2002) 286 F.3d 122. [The court noted that salary, vacation, sick pay, health, disability or life insurance, death benefits or pension benefit the employee independently of the employer while the benefits received by the complainant –

Additionally, the federal courts require that benefits meet a minimum level of "significance" or substantiality, in order to conclude that an employment relationship existed. Thus, a volunteer who receives *nothing* in return for his/her labor inarguably falls outside DFEH's jurisdiction.

> *Example: The complainant volunteered for the city in which he resided as a Community Service Officer, assigned to a grammar school. He assisted with traffic duties, crime prevention and neighborhood watch programs. He had a "regular work schedule, worked on holidays, and took two weeks' vacation each year." The officers who supervised his activities found his performance satisfactory and even attempted, unsuccessfully, to secure a grant in order to establish a paid position for him. When his position was eliminated, the complainant filed a complaint alleging that he had been subjected to discrimination because of his physical disability.*
>
> *The court concluded that he was not an employee of the city and, therefore, he could not state a claim under the FEHA. The complainant received no remuneration of any kind from the city and could not establish that an employment relationship had been created by estoppel as a result of the parties' conduct – public employment is governed by statute, not contract. The controlling city ordinance provided that community service officers only served via appointment by the city council, and the undisputed evidence showed that the complainant had never been appointed. His complaint was dismissed.*[86]

(3) Familial Relationship

An individual who is employed by his/her parents, spouse or child is not protected by the FEHA.[87]

> *Example: The female complainant was employed as a dispatcher by a trucking company that was founded*

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clerical support and networking opportunities – were "merely incidental" to administration of the Bar's programs for the benefit of its membership. To deem such benefits significant enough to meet the standard would "render all volunteer activity 'employment' under Title VII."]

[86] *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625.

[87] Gov. Code, § 12926, subd. (c); Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(2).

by her paternal grandfather and inherited by her father. She claimed that she was subjected to workplace discrimination because of her sex (gender). A male dispatcher with less related experience and education, as well as a shorter tenure with the company, was promoted to the position of Senior Dispatcher.

DFEH accepted the complaint for filing and gathered evidence from the respondent regarding the ownership of the trucking company. Documents provided confirmed that the complainant's father was the sole owner of the company. Therefore, DFEH concluded that it had no jurisdiction since the complainant was employed by her parent. The complaint was dismissed.

(4) Special Licenses

"Employee" also excludes any individual who is employed "under a special license in a non-profit sheltered workshop or rehabilitation facility."[88]

(5) Employment Agencies

An "employment agency" is defined as "any person who procures or finds employees or opportunities to work on behalf of another person."[89] The agency is *not* an employee of the individual or entity on whose behalf it secures employees or employment opportunities.[90] It is, however, an *agent* of that person and may be held liable for its own unlawful conduct committed in its capacity as an agent.

Example: Able Employees Agency (Able) entered into an agreement with a local furniture manufacturer to procure suitable employees to work in the shipping department. The manufacturer specifies the qualifications (education and experience) each employee should possess. In addition, the manufacturer's human resources director advised Able's manager that "the boss really won't be happy if he looks up and sees African-American employees in

[88] Gov. Code, § 12926, subd. (c); Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(3).
[89] Gov. Code, § 12926, subd. (e).
[90] Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(4).

the shipping department, if you get my drift." Able's manager complied by informing every African-American candidate who applied that all available positions had already been filled, but Able would keep their application on file in the event of future openings. The complainant, an African-American man whose qualifications exceeded the manufacturer's guidelines, learned of the manufacturer's discriminatory conduct and filed a complaint with DFEH which was found to be meritorious. Able is liable for its own conduct, i.e., carrying out the discriminatory behavior suggested by the manufacturer, because it served as the manufacturer's agent. Able was not an employee of the manufacturer, however. The manufacturer is also liable for the unlawful discrimination perpetrated by its authorized agent, Able, as directed by its representative, the human resources director. Both Able and the manufacturer violated the FEHA.

2) Partners and Shareholders

A complainant may be deemed an employee and entitled to the FEHA's protections even if he/she holds a partnership interest in a business entity or is a shareholder in the corporation where he/she works.

The relationship between the individual and the entity in question must be analyzed, including, but not limited to, six key factors:

a) Whether the organization can hire, fire or establish rules and regulations governing the individual's work performance;

b) Whether and to what extent the organization supervises the individual's work;

c) Whether the individual reports to someone higher in the organization;

d) Whether and to what extend the individual is able to influence the organization;

e) Whether the parties intended via the written agreements/contracts they entered into for the individual to be an employee;

f) Whether the individual shares in the profits, losses and liabilities of the organization.[91]

As with the analysis employed to determine whether an individual is an employee or independent contractor, the focus is on control, i.e., the extent to which he/she "acts independently and participates in managing the organization." The individual's job title is *not* determinative:

> The mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he/she is an employee or a proprietor . . . Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee.[92]

Rather, the inquiry is fact-specific, focusing upon the unique circumstances of the parties.

> *Example: The complainant was a physician and a partner in a general partnership of physicians which provided medical services to members of a large health plan. Under the terms of the written partnership agreement, the complainant was eligible to receive an annual year-end payment and his compensation level was dependent upon the financial performance of the partnership. (In contrast, employees received a salary that was deemed an "expense and financial obligation of the partnership.") The personal liability of the partners for the partnership's debts was unlimited and partners were automatically retired from the partnership upon reaching age 65 or removed involuntarily by a three-fourths vote of the board of directors and all partners. The complainant contended that the partnership engaged in age discrimination by admitting new physicians to the partnership at different compensation levels dictated by their age and forcing him to retire following his 65th birthday.*
>
> *The partnership argued that the complainant could not pursue remedies for a violation of the FEHA because he was not an employee of the partnership. The court agreed, finding that the complainant's right to participate in management of the partnership, participation in the group's profits and losses, and potential personal liability for partnership transactions demonstrated that he was a partner and not an employee.*

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[91] *Clackamas Gastroenterology Associates, P.C. v. Wells* (2003) 538 U.S. 440.
[92] *Clackamas Gastroenterology Associates, P.C. v. Wells* (2003) 538 U.S. 440.

Employees were paid a salary which was not dependent upon the partnership's profits or losses and did not have a right to receive additional payment at the end of the year if the partnership earned a profit. Additionally, as a partner, the complainant had a right to vote on various issues including changes to the written partnership agreement, admission of new physicians as partners, discharge of partners, etc. Employees did not enjoy comparable privileges. Finally, under the terms of a general partnership, the partners are liable jointly and severally for all obligations and liabilities of the partnership. Employees have no personal liability for their employer's debts.

The complainant could not sustain a complaint founded upon violations of the FEHA.[93]

3) Job Applicants

Job applicants *are* protected by the FEHA.[94]

4) Disparate Treatment

The complainant must be a member or perceived to be a member of a class of persons protected by the FEHA in order to file a complaint alleging that he/she was subjected to disparate treatment on that basis. Stated differently, the harm must have been suffered by the complainant *because of* his/her status as a person subject to the FEHA's protections. In each of the following examples, the complainant was the direct victim of the discrimination.

Example: A male African-American complainant alleges that he was not selected for a promotion, despite having more relevant experience and education than the successful candidate, because of his race (African-American) and color (black).

Example: A female employee contends that she was subjected to workplace discrimination because of her sex (gender), national origin and ancestry. She, like her ancestors, was born in Mexico but now resides and is employed in California.

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[93] *Imperato v. Southern California Permanente Medical Group* (2007) 2007 WL 1979041. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

[94] Gov. Code, § 12940, subd. (a).

5) Adverse Impact

A complainant may also assert that a facially neutral workplace policy or practice had an adverse impact upon members of particular protected classes enumerated in the FEHA. In such case, the employer bears the burden of demonstrating that the policy or practice is "sufficiently related to an essential function of the job in question to warrant its use."[95]

The complainant may have standing to file a complaint assailing the policy or practice, even though he/she suffered harm only indirectly as a result of its application in the selection process or workplace.

See complete discussion in Chapter entitled "Adverse Impact."

6) Retaliation

A "person" may complain that he/she was "discharge[d], expel[ed], or otherwise discriminate[d]" against because he/she opposed an employment practice made unlawful by the FEHA or "filed a complaint, testified, or assisted in any proceeding under this part."[96] Note that under the express language of the FEHA, an employment relationship is *not* a prerequisite to a retaliation complaint.

> *Example: Film and television writers are subject to a "unique hiring process" whereby employment opportunities are communicated directly to the talent agencies by which they are represented by the various studios. There is no other way for them to become aware of or apply for open positions, i.e., they must be referred via an agency. The agencies receive a percentage of their clients' earnings. Thus, both writers and agencies depend upon their relationships with studios for their livelihood.*
>
> *One such agency became aware of a studio's desire to attract young audiences, i.e., under the age of 40. Specifically, the studio's representative advised the agency not to offer the writing opportunities it advertised to any of the agency's clients over the age of 40, saying "those old guys just don't understand what young audiences want to see."*
>
> *The agency advised the studio in writing that it refused to abide by the studio representative's directive and continued referring*

[95] Cal. Code Regs., tit. 2, § 7287.4, subd. (e).
[96] Gov. Code, § 12940, subd. (h).

clients of all ages in response to advertised calls for writers. However, after a period of time, the agency received no further notice of open positions and inquired why it was no longer receiving the information. The same representative responded, "Hey, I warned you not to send those old geezers over here for interviews. We're not going to hire them and we don't have time to waste on interviewing them."

The agency has standing to file a complaint with DFEH alleging that it has been subjected to retaliation because it opposed an employment practice, discrimination because of age, which is unlawful under the FEHA. The studio and agency both fall within the definition of "person" set forth in Government Code section 12940, subdivision (h). It is not necessary that the two entities have an employment relationship in order for DFEH to have jurisdiction over the agency's complaint.[97]

See complete discussion in Chapter entitled "Retaliation."

b. Person Claiming to be Aggrieved by an Alleged Unlawful Practice Because of His/Her Relationship With Another Person Who is Protected

1) Association with Protected Person(s)

It is unlawful to discrimination, harass or retaliate against an individual because he/she associates with a person subject to the law's protection.[98]

Example: An African-American employee reveals to his employer that his wife is Caucasian. Shortly thereafter, despite excellent performance reviews coupled with progressive salary increases, the employee is called into a meeting where his employment is abruptly terminated and no plausible justification for the action provided. The employee believes, based upon comments he has heard the employer make to other employees about interracial relationships, that the termination occurred because he and his wife's different races, colors and ancestry. The employee is a proper complainant because his claim of discrimination is founded upon his race, color and ancestry coupled with his association with his wife.

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[97] *Alch v. Superior Court* (2004) 122 Cal.App.4th 339.
[98] Cal. Code Regs., tit. 2, § 7287.9

2) Bystander Harassment

A complaint may be filed by a person who was subjected to offensive workplace conduct, even if the behavior was not directed at him/her. If he/she perceived and experienced the conduct, he/she has standing to complain.

> *Example: A male employee was subjected to speculation, gossip and inappropriate commentary by his fellow employees about a co-worker's sexual orientation. The complainant's sexual orientation is irrelevant. If he was subjected to unwelcome and offensive behavior, he may file a complaint.*

> *Example: A female employee was told that during her lunch period when she was not present in the workplace, several co-workers engaged in telling inappropriate jokes containing racial slurs and epithets. She was neither subjected to nor personally perceived the behavior; rather, she was merely informed about it by her colleagues when she returned to the workplace. She has not been subjected to workplace harassment and may not properly file a complaint.*

See complete discussion in Chapters entitled "Sexual Harassment" and "Harassment."

3) Organization/Association Claiming to be Aggrieved by an Alleged Unlawful Practice

An organization may be aggrieved by discrimination committed against individuals or groups of individuals because of those persons' protected status when the policy or practice in question adversely impacts the organization's members.

Labor unions have standing to file complaints as "aggrieved persons" in order to challenge discriminatory hiring practices which harm the organization as a result of lost members or payment of dues, disparate salary policies or any other type of discrimination.

Examples of other organizations that have standing to file complaints include groups that advocate for the eradication or prevention of discrimination (whether or not the persons on whose behalf they advocate are members) if the unlawful practice(s) at issue or the group's eradication effort(s) diverted or expended resources.

> *Example: A local organization's major focus is helping battered women escape abusive environments and relationships,*

counseling and assisting them with securing employment. The organization discovers that a particular local employer's discriminatory practice – significant salary disparities between male and female employees performing the same duties – is impacting its clients. The organization diverts its resources into an investigation of the employer's practices. Accordingly, the organization has standing to file a complaint challenging the employer's policies and practices.

c. The Director of DFEH

The Director or his/her authorized representative may file a complaint of discrimination if he/she has knowledge of an employment practice or policy in violation of the FEHA, irrespective of whether the policy or practice impacts an individual or group.[99]

Class Actions

When an unlawful employment practice adversely impacts a group or class of persons or raises issues of law or fact common to the group or class, an aggrieved person who is a member of the impacted group or class may file a complaint. The Director may also file a complaint on behalf and as a representative of the group or class.[100]

d. Employer

An employer may file a complaint when some or all of its employees refuse or threaten to refuse to cooperate with the provisions of the FEHA, asking that DFEH assist in remedying the actual or threatened violation through conciliation or enforcement efforts.[101]

e. Complainant's Attorney

The duly authorized legal representative of a complainant may file a DFEH complaint on behalf of his/her client(s). As explained above, the attorney may not execute the complaint in his/her client's name, but may, in his/her capacity as the complainant's representative, sign his/her own name.

f. Guardian ad Litem

A guardian ad litem is an adult (over the age of 18) who serves as the duly authorized representative of a complainant who has not yet reached the

[99] Gov. Code, §§ 12960, 12961. See DFEH Enforcement Division Directives 222 and 223.
[100] Gov. Code, § 12961. See DFEH Enforcement Division Directive 226.
[101] Gov. Code, § 12960, subd. (c).

age of majority, i.e., is under the age of 18. It is not necessary that the adult representative be appointed by the FEHC or court to serve as the minor's guardian ad litem during the complaint-filing and investigative phase.

Example: A woman alleges that she and her three minor children were denied access to a business establishment because of their race (African-American) and color (black). She may file a complaint alleging that the business establishment violated the Unruh Civil Rights Act, along with a complaint on behalf of each of her children.

g. Decedent's Estate

A complainant may be filed and a remedy obtained on behalf of a complainant who either died before the complaint could be lodged with DFEH or while the investigation or litigation is pending.[102]

h. Collective Bargaining Unit/Union

In addition to filing a complaint in its own name, a collective bargaining unit or union may file a complaint on behalf of one or more of its members who are aggrieved by an alleged policy or practice.

i. Organizations/Associations

In addition to filing a complaint in its own name, as discussed above, an organization or association may file a complaint on behalf of one or more of its members who are aggrieved by an alleged policy or practice.

2. Respondents

Generally, DFEH has jurisdiction to accept complaints naming the following persons as respondents:

- Employers
- Apprenticeship training programs
- Labor organizations/collective bargaining units/unions
- Employment agencies
- Licensing boards
- Other persons

[102] See DFEH Enforcement Division Directive 229.

a. Employers

The FEHA's provisions apply to three broad classes of California employers:

- Private profit-based and non-profit employers and their successors
- All public employers irrespective of the number of employees
- Agents

Under the FEHA, "employer" is defined as "any person regularly employing five or more persons, or any person *acting as an agent of* an employer, directly or indirectly, the State or any political or civil subdivision of the State, and cities," except "a religious association or corporation not organized for private profit." [Emphasis added.][103]

As to complaints founded upon allegations of *harassment*,

> "employer" means any person regularly employing one of more persons or regularly receiving the services of one or more persons providing services pursuant to a contract or any person acting as an agent of an employer, directly or indirectly, the State, or any political or civil subdivision of the State and cities.[104]

1) Private Profit-Based and Non-Profit Employers and Their Successors

It is irrelevant, for the purpose of establishing DFEH's jurisdiction, whether an employer exists and is organized for the purpose of earning a profit or not. "Employer includes any non-profit corporation or non-profit association other than" one which is a religious association or corporation.[105]

Charitable entities or organizations, social clubs, fraternal and other organizations that employ five or more individuals or is in an agent relationship with another entity must comply with the provisions of the FEHA.

> *<u>Example</u>: A non-profit private association admitted only men to membership and hired only men in management positions or other job classifications requiring the employee to be present during club functions. It was the association's policy to employ*

[103] Gov. Code, § 12926, subd. (d); Cal. Code Regs., tit. 2, § 7286.5, subd. (a). [The FEHC's Regulations clarify that a contract of employment may be "express or implied, oral or written."]
[104] Gov. Code, § 12940, subd. (j)(4)(A).
[105] Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(6). See discussion of religious exemption below.

women only in positions not requiring their presence at functions. Thus, women were only hired in accounting and administrative positions and the association's print shop, as maids and food servers for private parties hosted by members.

The association contended that it was exempt from the FEHA because of its non-profit status. The court concluded, however, that only religious non-profit associations and corporations are exempt, based upon not only the operative language of the statute, but also its history: The FEHA's original definition of "employer" did not include social clubs, fraternal, charitable, educational or religious associations or corporations not organized for private profit. However,

> *[b]y specifically deleting "social clubs" from the statutory exemption, it appears that the Legislature no longer wished to afford such entities an exemption from the non-discrimination policies of the FEHA. Moreover, the deletion of charitable organizations, which are by nature non-profit, clearly indicates that the term religious was intended to modify both "association" and "corporation not organized for private profit." Had the Legislature simply intended, as respondent suggests, to exempt all non-profit corporations, it seems unlikely that it would have deleted charitable organizations from the exemption provision. In any event, we conclude that the adjective "religious" must be read as modifying both "association" and "corporation not organized for private profit." And, upon this reading of the statute, we conclude that only religious associations or non-profit corporations are exempt from the antidiscrimination provisions of FEHA. . .* [106]

2) Public Employers

Public employers subject to DFEH's jurisdiction include all governmental or quasi-governmental entities and their governing boards such as:[107]

a) The State and all political or civil subdivisions thereof
b) Counties
c) Cities
d) City and County, e.g., San Francisco
e) Local agencies
f) Special districts, e.g., water, sewer, fire districts

[106] *Bohemian Club v. Fair Employment & Housing Com.* (1987) 187 Cal.App.3d 1.
[107] Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(4).

g) School districts
h) University of California and California State University systems
i) Land grant institutions established by a constitutional charter

Every public entity falls within the FEHA's definition of "employer" whether or not the entity has five or more employees.

3) Determining the Number of Employees

a) "Regularly" Employed

The employer must employ five or more individuals (one or more individuals when harassment is alleged) "for each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year."[108] The "calendar year" is the year(s) in which the violation(s) alleged occurred.[109] The employer need not have employed the *same* persons for twenty weeks nor is it necessary that the employee have been present in the workplace each and every day of the period of time in question.

For jurisdictional purposes, it is irrelevant whether the employees are employed full- or part time.[110]

The determinative factor is the "number of persons on the payroll, not the number working on any particular day."

> *Example: The complainant alleged that her employer, a dentist, refused to reinstate her to her position following pregnancy disability leave. The dentist employed three employees who worked five days per week, but also employed three part-time dental hygienists. One worked four days per week, one worked two days per week and one worked only on Saturday mornings. The dentist contended that he was not subject to the FEHA because some of his employees worked part-time and were not physically present in the office on each working day, even though there were five or more employees on the payroll for at least twenty consecutive calendar weeks of the current and preceding years.*
>
> *The court examined the FEHA's legislative history, as well as prior decisions of the FEHC. The FEHA is to be*

[108] Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1).
[109] *DFEH v. Sid's Barber and Style Salon* (1987) FEHC Dec. No. 87-33, p. 6.
[110] Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(2).

interpreted so as to provide the broadest possible protections and further the remedial purposes of the statute. The law already contains an exemption for small employers with less than five employees. Further, if the dentist's interpretation of the statute were accepted, injustice could result because of the number of California employers that would fall outside the law's reach.

The dentist was found to regularly employ five or more persons and, accordingly, required to comply with the provisions of the FEHA pertaining to pregnancy disability leave.[111]

Example: In the case discussed above of the female barber who alleged that she was subjected to workplace harassment and discrimination, the FEHC noted that even if the manager and some of the employees were actually independent contractors, they could be counted, solely for jurisdictional purposes, as "individuals employed at the salon."[112] *However, even without taking those persons' status into account, the FEHC concluded that the salon regularly employed more than five individuals. Among the evidence considered was:*

- *Testimony offered by employees about the number of persons consistently present and working in the salon;*
- *Testimony offered by long-term customers about the number of persons consistently present and working in the salon;*
- *Cash register tapes which corroborated the testimony adduced, as well as other written documentation such as attendance and payroll records.*[113]

See also discussion regarding Joint Employers below.

b) Temporary vs. Permanent Employees

Temporary employees, including those performing seasonal work or duties, are not considered "regularly" employed, except for the purpose of ascertaining whether the employee is eligible

111 *Robinson v. Fair Employment and Housing Commission* (1992) 2 Cal.4th 226.
112 *DFEH v. Sid's Barber and Style Salon* (1987) FEHC Dec. No. 87-33, p. 7.
113 *Id.*

for leave in accordance with CFRA.[114] Therefore, they are not taken into account for the purpose of determining whether or not an employer employs the requisite number of persons to fall within the FEHA's provisions.

> *Example: The complainant was hired by a public entity as a temporary office assistant, working full-time. Following a work-related injury, she was cleared by her physician to return to work with restrictions. She requested that she be granted a reasonable accommodation, but her employment was instead terminated the very same day. The employer asserted that, under the terms of an applicable salary ordinance, temporary employees were allowed to work a maximum of 1,000 hours per year and the complainant had already exceeded that allotment. It further argued that employment could not be offered for a longer period of time absent an express request that the term be extended and no such request had been lodged.*
>
> *The court agreed with the employer, finding that temporary employment with a public employer cannot be transformed into "regular" employment in violation of controlling law:*
>
> > *As a matter of California law, the mere lapse of time that an employee occupies a position designated as "temporary" is not sufficient, of itself, to render the employee a de facto regular or permanent employee. Whether an employee has achieved regular or permanent status depends entirely on what the authorizing legislation provides. Here, the salary ordinance clearly contemplates both regular and temporary positions; temporary is not defined in terms of limited duration of the position, but in terms of the characteristics of wages and benefits.[115]*

b. Agents

An agent is a person who acts on behalf or in the place of his/her principal, i.e., the person who created the agent relationship by authorizing the agent to act for him/her. The agent represents the principals in dealings with third persons.

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[114] 29 C.F.R. § 825.110(b).

[115] *Jenkins v. County of Riverside* (2006)138 Cal.App.4th 593.

Because agents fall within the FEHA's jurisdiction, DFEH can receive and investigate a complaint naming an "agent-employer" as a respondent if the agent engaged in unlawful practices.

A parent corporation may have one or more subsidiaries, i.e., the entities may be under the same or substantially the same ownership, but function as totally separate entities. The California courts have held that in order to hold a parent corporation liable for the acts of its subsidiary by arguing that the subsidiary was the parent's agent, the evidence must demonstrate "more than mere representation of the parent by the subsidiary in dealings with third persons." The evidence must establish that the "parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent."[116]

The courts utilize an "integrated enterprise" to determine if a parent and subsidiary should be deemed one employer, examining four factors:

1) Interrelation of operations;
2) Common management;
3) Centralized control of labor relations; and
4) Common ownership or financial control.

Common ownership or control is *never* sufficient by itself to hold a parent liable for the acts of the subsidiary and the most important factor is which corporation made final decisions concerning employment matters.[117]

> *Example: The complainant alleged that he was subjected to sexual harassment by his female supervisor that included offensive touching, name-calling and language. He also claimed that after he complained, he was unfairly disciplined along with the harasser in retaliation for complaining and forced to resign his employment.*
>
> *The complainant filed complaints naming both the corporation where he worked, a subsidiary, and the parent corporation, claiming that both were liable for his damages. In support of his argument, he cited the parent's provision of employee benefits programs and sexual harassment training, issuance of an employee code of conduct and the fact that general counsel represented both corporations. However, the court found those factors insufficient.*
>
> *There was no evidence that the supervisors and managers who imposed discipline upon the complainant did so under the direction of the parent corporation's management. Rather, the evidence established that the two corporations operated independently,*

[116] *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727.
[117] *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727.

maintaining separate human resource and payroll departments. They did not share management employees.

Thus, the evidence failed to show that the parent exercised control over the subsidiary's employment decision, the operations were interrelated such that the parent exercised more control over the subsidiary's operations that would normally be expected in a parent-subsidiary setting, or that the two share common management. Therefore, the claims against the parent corporation were dismissed.[118]

c. Successor Employers

When a business entity is sold or ownership is otherwise transferred, the new owner(s) may be held liable for the prior owner's unlawful conduct if the new owner is deemed a "successor employer" under controlling law.

The courts and FEHC analyze several factors to determine whether an entity qualifies as a successor employer, including but not limited to:

1) Whether the successor company had notice of the complaint;
2) The ability of the predecessor to provide relief;
3) Whether there has been a substantial continuity of business operations;
4) Whether the new employer uses the same plant;
5) Whether the employer uses the same or substantially the same workforce;
6) Whether the employer uses the same or substantially the same supervisory personnel;
7) Whether the same jobs exist under substantially the same working conditions;
8) Whether the employer uses the same machines, equipment and methods of production; and
9) Whether the employer produces the same product.[119]

It is irrelevant, for the purpose of establishing liability for unlawful discrimination, whether the two entities entered into an agreement under which the successor employer would not be liable for the acts of the original entity.[120]

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[118] *Cellini v. Harcourt Brace & Co.* (1999) 51 F.Supp.2d 1028.
[119] *DFEH v. Reliance Private Security* (1998) FEHC Dec. No. 98-03, citing *DFEH v. C.E. Miller Corp*. (1984) FEHC Dec. No. 84-02.
[120] Such a contractual provision may allow the successor employer to sue the prior entity for indemnification after it has provided a remedy to the complainant.

Example: The complainant alleged that he was subjected to discrimination because of his age. He applied but was not hired for a position as a security guard. The employer security company was established as a partnership, but later incorporated. The complaint was amended to name the corporation as a successor employer.

The FEHC found a substantial number of the elements enumerated above, concluding that the corporation did, in fact, succeed the original partnership. The sole owners of both entities received timely notice of the complaint and accusations. The corporation was the same business as the prior partnership with all of the partnership's assets, the same employees and customers. The corporation's employees (security guards) continue working under the same conditions, at the same rates of pay, operating out of the same facility. Thus, the corporation was found liable for the unlawful actions taken against the complainant by the partnership.[121]

d. Joint Employers

Two or more employers may be deemed to be *joint* employers for the purpose of determining whether the entity employs enough employees for DFEH to take jurisdiction over a complaint.

The joint employer principle most often comes into play in the context of a complaint alleging denial of CFRA leave since, in order to be eligible for CFRA leave, an employee must be employed by an entity with 50 or more employees within 75 miles of the employee's worksite. [122] However, joint employment could become an issue with very small employers when discrimination is alleged and neither employer's workforce totals five regularly employed persons.

The courts and FEHC consider a number of factors in order to determine whether the two entities' business activities and management are sufficiently distinct and disconnected to deem them separate employers for the purpose of calculating the number of employees. In cases where the two entities' business practices, management and operational activities are closely intertwined, they will be considered joint employers for the purpose of establishing jurisdiction.

The relationship between the two employers as a whole will be considered and no single aspect is determinative. The factors to be considered include which employer:

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[121] *DFEH v. Reliance Private Security* (1998) FEHC Dec. No. 98-03

[122] Cal. Code Regs., tit. 2, § 7297.0, subd. (e)(3); see 29 C.F.R. § 825.106(a) and (b).

1) Has the power to hire and fire employees;
2) Supervises and controls employee work schedules, activities and conditions of employment;
3) Determines the rate of pay and method of payment regarding employees;
4) Maintains records concerning the workforce;
5) Provides employment benefits such as health insurance;
6) Provides the premises and equipment used by the employees.[123]

Example: The complainant contended that he was denied leave in accordance with CFRA. He alleged that he worked for a covered employer. His complaint named both Z Corporation and Company A as respondents on the theory that they were joint employers. Z Corporation claimed that the complainant was its employee, but it was not a covered employer. The evidence showed:

a) Z Corporation sold products to and invoiced Company A.
b) The two entities were owned by the same two individuals and had a common agent for service of process.
c) The two entities were established as separate corporations, incorporated in different states.
d) Complainant was on Z Corporation's payroll, but not Company A's.
e) The complainant performed work that benefited both Z Corporation and Company A: He estimated that 80% of his activities were for Z Corporation and 20% for Company A.
f) All of the accounting, record-keeping and payroll functions for the two entities were maintained separately.
g) Each corporation maintained a separate benefits package for its employees, including different medical plans billed at differing premium rates.
h) The management employees of the two entities had authority only to make decisions and implement policies for the company that employed them, but not for the other corporation.
i) The complainant was supervised by and received direction only from management employees of Z Corporation.
j) Z Corporation's employees used tools and equipment belonging to both corporations.
k) The two corporations shared a physical plant, offices and human resources department.

Further investigation was required to determine whether the employment was joint. The fact that neither company had the authority to manage the other's workforce by determining employee

[123] *Moreau v. Air France* (9th Cir. 2004) 356 F.3d 942.

work schedules, pay rates or payroll method militated against the two entities being joint employers, however, their shared human resources department suggested joint control regarding the terms and conditions of employment. Additional information needed in order to draw a conclusion included the extent to which the two companies shared management personnel, the two shareholders' decision-making authority as to each entity, whether the two companies shared a common human resources department or had separate ones and the level of control exercised over the employees of the two entities, whether other employees' services were shared.

Example: The complainant, an African-American male, was employed as a firefighter by a city. He had a chronic dermatological disorder, common only to African-American men, which causes facial hairs to curl back into the skin. The recommended treatment is discontinuation of shaving. Accordingly, the city fire department allowed him to maintain a short beard. However, it implemented a new Respiratory Protection Policy prohibiting any individual with facial hair from being employed in fire suppression in accordance with federal and safety health and safety regulations. The city requested a variance from the State regulation and, when it was denied, terminated the complainant's employment.

The complainant named the State as a respondent, contending that it denied him a reasonable accommodation and subjected him to discrimination on the basis, race, color, ancestry, medical condition and physical disability. Admitting that the city was his "direct employer," the complainant argued that the State could be held liable to him under the FEHA as an indirect or joint employer even without a "direct employment relationship." He also contended that the State was an "aider and abettor of the discrimination."

The court rejected the complainant's argument on the ground that he had no employment relationship with the State. Liability is imposed upon entities with whom the complainant has at least an indirect employment relationship – otherwise there can be no unlawful employment practice for the FEHA to address and rectify. The State did not fall within the scope of the definition of employer and after examining the totality of the circumstances, the court found that it was not a joint employer of the complainant with the city, either. The State did not compensate the complainant or engage his services in any manner. The State had no control or the complainant, did not hire him, had no authority to discipline, promote, transfer or discharge him, did not establish his rate of pay or maintain any personnel records pertaining to his employment. The State did not train the complainant or any of the city's other employees and did not

interfere or participate in any fashion in the employment relationship. The city decided whether to implement the Respiratory Protection Policy. The court concluded it could "find none of the indicia of an employment relationship" between the complainant and the State.

Further, as a matter of policy, no employment relationship could be implied. The safety regulations adopted by the State were uniformly applicable to all employers within the State.

> *To find that the State is [complainant's] employer within the meaning of [the] FEHA merely by virtue of enactment of regulations that affect the conditions of employment would effectively make the State the potential employer of any person employed by any business that must comply with State law. Nothing in the provision or rationale of the FEHA suggests such an all-encompassing definition of employer.*

The court was equally unmoved by the fact that the State enforced the regulations and imposed citations and/or fines upon entities that did not comply, in addition to failing to grant the city's request for an exemption. "A finding of the right to control employment requires a much more comprehensive and immediate level of 'day-to-day' authority over employment decisions. . . The necessity of compliance by an employee's direct employer with State regulations is not enough to create the requisite employment relationship with the State." The mere exercise of the State's police power is insufficient to create an indirect employment relationship. The complainant's recourse was against his employer, the city fire department, not the State.[124]

e. Labor Organizations

A "labor organization" is defined in the FEHA as "any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions or employment, or of other mutual aid or protection."[125]

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[124] *Vernon v. State of California* (2004) 116 Cal.App.4th 114. [The court also expressly distinguished this case from others brought by, e.g., teachers and nurses, alleging that the State's testing or licensing requirements could subject it to indirect employer liability under Title VII or the FEHA when such requirements had an adverse impact upon a particular group of potential employees. The key difference was that in the cases cited, the State's regulatory activity interfered with individual employment opportunities through "actual control over access to the job market." Additionally, in those cases, the indirect employer was also the entity that performed the discriminatory act. Here, the *State's* conduct was not at issue, nor did it exert complete authority or supervision over the daily operations of the city's fire department.]

[125] Gov. Code, § 12926, subd. (g).

f. Employment Agencies

The FEHA defines an "employment agency" as "any person undertaking for compensation to procure employees or opportunities to work."[126]

An individual who secures employment through an employment agency may file a complaint against both the agency and the employer to which the agency assigned him/her to actually perform work. Additionally, if the employee is subjected to harassment, he/she may file a complaint naming the harasser as a respondent.

> *Example: The complainant registered with an employment agency which performed a background check, tested her skill levels and referred her to a company where she actually reported to and performed work. She was subjected to workplace sexual harassment by her immediate supervisor there. She filed a complaint with DFEH, naming the employment agency, the company to which the agency assigned her and the individual supervisor who harassed her as respondents.*

g. Licensing Boards

The term "licensing board" is defined in the FEHA as "any State board, agency, or authority in the State and Consumer Services Agency that has the authority to grant licenses or certificates that are prerequisites to employment eligibility or professional status."[127]

The FEHA prohibits licensing boards from requiring any examination or qualification that adversely impacts any group on the basis of race, creed, color, national origin or ancestry, sex, age, medical condition, physical disability, mental disability, age or sexual orientation unless the practice in question is job related.[128]

If the FEHC finds an examination unlawful, the board in question may consider administering it until it has exhausted its right to judicial review of the FEHC's determination. Additionally, such determination does not "void, limit, repeal, or otherwise affect any right, privilege, status, or responsibility previously conferred upon any person by the examination or by a license issued in reliance upon the examination or qualification."

For the purpose of calculating the statute of limitations, a complaint alleging that an examination or qualification standard was discriminatory

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[126] Gov. Code, § 12926, subd. (e).
[127] Gov. Code, § 12944, subd. (f).
[128] Gov. Code, § 12944, subd. (a).

must be filed within one year of the date of the alleged violation. In such instances, the date notice is received from the licensing board that a candidate did not pass or attain the necessary minimum score on an examination in question is the controlling date.[129]

It is also a violation of the FEHA for a licensing board to "fail or refuse to make reasonable accommodation to an individual's mental or physical disability or medical condition."[130] Thus, a board may be legally required to modify its facilities, tools provided to persons taking the examination offered, the scheduled date and/or time of the examination or any other aspect in order to allow access and the opportunity to participate in the examination process by a person who is a member of a protected class.

There are no published decisions on point, but it can be presumed that a reasonable accommodation request would be analyzed by considering whether granting it would result in an undue hardship inuring to the licensing board.[131]

> *Example: A State board scheduled an examination, the successful completion of which is a prerequisite to employment and recognition of professional status in a particular field of expertise, on Tisha B'Av. The examination is given only twice each year, spans a period of three days and requires that candidates register not later than sixty days prior to the examination in order to participate.*
>
> *The complainant describes himself as an Observant Jew and explains that he observes all major and most minor Jewish holidays. Tisha B'Av is considered a "minor" holiday. The observance is characterized by fasting, meditation and a refrain from bathing or working until sundown on the last day of the observance. The complainant alleges that he has contacted the State board and asked for a reasonable accommodation, i.e., the opportunity to take the examination on an alternate date, but his request was denied. He argues that if his request is not granted, he will have to wait another six months for an opportunity to sit for the examination.*
>
> *Whether or not the FEHA has been violated would, in all likelihood, be determined by analyzing whether or not granting the accommodation requested or another reasonable accommodation which would allow the complainant to participate in the examination process would create an undue hardship for the board. The factors considered would include any costs incurred by offering the*

[129] See DFEH Enforcement Division Directive 221.
[130] Gov. Code, § 12944, subd. (b).
[131] Because there are no precedents, DFEH staff should seek guidance from a DFEH Legal Division Staff Counsel.

examination at an alternate time such as facility fees (rent, security, etc.), payroll (examination proctors), transportation, publicity, etc. Additionally, a licensing board might argue that it would be required to bear the cost of devising more than one version of the examination in order to prevent cheating or that a separate grading process would have to be implemented if, for example, two different versions of the examination were drafted and offered.

Example: The complainant asserted that he recently moved to California from another state and has a physical disability. He was limited in the major life activity of walking, using a wheelchair at all times to ambulate. He registered to take an examination offered by a State licensing board which he was required to pass in order to lawfully engage in his profession. The application form used by the State board asked applicants to list any reasonable accommodation(s) needed in order to participate in the examination. On the application form he submitted, the complainant disclosed that the examination room must be accessible via wheelchair.

The complainant received a letter from the licensing board stating that the board was headquartered and offered the examination in a building that has been designated a historical landmark. The board contended that it was mandated to comply with legal standards concerning remodeling or modifying the building. It also explained that its past request to install an elevator in the building was denied. Therefore, it informed the complainant that it could not provide the requested accommodation since the only room available in which to offer the examination was located on the second floor.

Among the factors that must be analyzed to determine whether or not a violation of the FEHA has occurred are the costs that would be incurred by the board were it to offer the examination in an alternate location.

h. Persons Who Aid, Abet or Coerce Unlawful Behavior

It is unlawful for any "person," as that term is defined in the FEHA to "aid, abet, incite, compel, or coerce" behavior that is prohibited or "attempt to do so."[132] The concept requires two persons to be involved in the conduct, one helping the other.

The courts have held that the language of the FEHA does not permit supervisorial or managerial employees to be held individually liable for aiding or abetting the employer to manage the workforce in a

[132] Gov. Code, § 12940, subd. (i).

discriminatory manner.[133] "Had the Legislature intended to place all employees charged with the duty of making personnel decisions in California at risk of personal liability, we believe the Legislature would have done so by language more direct and less susceptible to doubt . . . "[134]

The "plain language" of the FEHA does, however, apply to "third parties such as customers or suppliers."[135]
The FEHA does not include an explicit definition of the terms "aid" or "abet," but many different types of conduct can be encompassed. For instance, it is unlawful to:

1) Assist any person or individual in doing any act known to constitute unlawful employment discrimination.
2) Solicit or encourage any person or individual to violate the FEHA, irrespective of whether the FEHA is actually violated;
3) Coerce any person or individual to commit unlawful employment discrimination with offers for cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit;
4) Conceal or destroy evidence relevant to investigations initiated by the FEHC, DFEH or their staffs.
5) Advertise for employment on a basis prohibited by the FEHA.[136]

The courts have held that a respondent will be held liable for his/her conduct if he/she "knows [another person's] conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or [ ] gives substantial assistance to the other in accomplishing"[137] conduct that violates the FEHA.

Simply having knowledge of or being present when wrongful acts are committed and not taking preventive or remedial does not meet the legal standard "unless it is the normal business duty of the person of individual to prevent or report such acts."[138]

Rather, in order for a complaint based upon this theory to be found meritorious, the investigation must establish the identity of the person who

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[133] The FEHA *unequivocally* imposes liability upon individuals for workplace harassment. (Gov. Code, § 12940, subd. (j)(1).)
[134] *Reno v. Baird* (1998) 18 Cal.4th 640, 656, citing *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78-79.
[135] *Reno v. Baird* (1998) 18 Cal.4th 640, 656, citing *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78-79.
[136] Cal. Code Regs., tit. 2, § 7287.7, subd. (a).
[137] *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325.
[138] Cal. Code Regs., tit. 2, § 7287.7, subd. (b)(1).

aided and abetted the conduct, that he/she had knowledge that the FEHA was violated by the person(s) or entity/entities he/she aided and abetted, and the manner in which the aiding or abetting was accomplished.[139]

Example: In the case concerning the film and television writers who contended that they were subjected to age discrimination, the complainants named the various studios where they were employed, as well as the talent agencies that represented them, as respondents. The writers alleged that the agencies knew about the studios' preference for younger writers and assisted the studios "in carrying out a systemic policy of age discrimination in hiring against older writers. . ." The writers described the "unique hiring process" in the entertainment industry: Employment opportunities are communicated directly to the agencies which are "well aware of the pattern or practice of age discrimination."

The writers demonstrated to the court's satisfaction, for the purpose of proceeding with their lawsuit, the

> *basis for the agency's awareness of the employers' ageist practices, including public statements by network executives and allegations that the employers have communicated to the agency their desire to hire younger writers or to exclude older writers. Subsequent paragraphs allege the agency's financial incentive to discriminate, the agency's own pattern and practice of discrimination with respect to its representation and referral of older writers, and evidence of the agency's pattern or practice of intentional discrimination, including ageist comments, statistical disparities, and instances of refusal to submit older writers for television writing opportunities with networks and studios. The . . . agency "has given substantial assistance and encouragement to each [studio] in carrying out its unlawful employment and business policies and practices in at least five ways . . . ," including the agency's refusal to represent older writers, failure to refer the older writers it represents to the employers as zealously as younger writers, communicating ageist stereotypes and motivations and thus discouraging older writers from seeking employment with the employers, and so on.*

Accordingly, the court found that "the agencies knew the employers were engaged in systemic discrimination on the basis of age, and gave 'substantial assistance or encouragement' to the employers by virtue of their own referral practices, screening out older writers in favor of younger ones." The court reached the same conclusion

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[139] *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 389.

"with respect to the writers' claims, in their suits against the employers, that network defendants have assisted or encouraged studio defendants to systematically exclude older writers."[140]

Example: In the case of the firefighter who was terminated from his employment because he could not wear the protective mask mandated by the city's Respiratory Protection Policy, the complainant contended that the State, which adopted and enforced regulations pertaining to the use of protective masks, should be held liable for his damages as an "aider and abettor."

However, the court held that the FEHA's prohibitions on discrimination are applicable only to employers and the State was not the complainant's employer. Additionally, the State is not listed as a "person" in Government Code section 12925, subdivision (d). "We think the most reasonable interpretation of the statutory scheme is that if the Legislature had intended to include public agencies in the definition of parties who may be liable as 'persons' under section 12925, subdivision (d), it would have expressly done so."

Additionally, the complaint did not set forth the requisite allegations that the State aided and abetted the city in enacting and enforcing discriminatory employment practices. The court pointed out the lack of evidence that the State and city acted jointly to implement the new Respiratory Protection Policy, noting that the city had, in fact, sought an exemption from the State regulation. The discrimination suffered by the complainant, if any, occurred as a result of "two separate entities acting independently, not assisting one another."[141]

i. Other Persons or Entities

"Other persons" is a broad "catch-all" category allowing individuals or entities to be named as respondents if they have engaged in conduct which constitutes a violation of the FEHA.

3. Bankruptcy

The filing of a petition for bankruptcy in the United States Bankruptcy Court operates as an automatic stay of any proceedings against the debtor.[142] That means that any pending actions either in the court or before the FEHC as of the date the petition is filed, cannot proceed unless an exception to the general rule is applicable.

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[140] *Alch v. Superior Court* (2004) 122 Cal.App.4th 339.
[141] *Vernon v. State of California* (2004) 116 Cal.App.4th 114.
[142] 11 U.S.C. § 362, subd. (a).

Such an exception is found in the Bankruptcy Code:

> (4) . . . the commencement or continuation of an action or proceeding by a governmental unit. . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.[143]

Government Code section 12920 establishes that the activities of DFEH are "an exercise of the police power of the State for the protection of the welfare, health, and peace of the people of this State." "California has a strong public policy against discrimination and harassment, enunciated unambiguously in the FEHA," including section 12920.[144] DFEH is the public prosecutor enforcing the right to be free from discrimination and harassment, representing and promoting the rights of the State of California rather than those of individual complainants.

Thus, "the police or regulatory power exception to the automatic stay applies to DFEH's action. . ." against a respondent which has sought protection from the Bankruptcy Court. DFEH may continue prosecuting its case and the FEHC will not be barred from hearing it.[145]

4. The Unruh Civil Rights Act

The Unruh Civil Rights Act (Unruh Act) provides that all business establishments must provide "full and equal accommodations, advantages, facilities, privileges or services" to clients, patrons or customers.[146] The purpose of the Unruh Act is to prevent proprietors from excluding individuals from their businesses because of a protected characteristic, including *but not limited to* sex (gender), race, color, religion, ancestry, national origin, disability, medical condition, marital status, and sexual orientation. Among the bases for discrimination which have resulted in the courts' imposition of liability are unconventional dress or physical appearance (e.g., long hair), sexual orientation, age, or membership in groups (e.g., John Birch society, American Civil Liberties Union). There is no statutory exemption for religious, private or non-profit organizations.

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[143] 11 U.S.C. § 362, subd. (b)(4).

[144] *DFEH v. SD City Event, Inc.* (2007) FEHC Dec. No. 07-01-P. See also Gov. Code, §§ 12930, 12935.

[145] Whenever a DFEH staff member becomes aware that a respondent has filed for protection in the Bankruptcy Court, all relevant information should be gathered and forwarded to DFEH's Legal Division in accordance with DFEH Enforcement Division Directive 306.

[146] Civ. Code, § 51.

The statute of limitations in which to pursue an Unruh Act claim is one year.[147]

The Unruh Act does not include a definition of "business establishment." Thus, in order to ascertain whether a particular organization is a business establishment, the FEHC and courts consider a number of factors, including:

a. What, if any, business benefits are derived from membership;
b. The number and nature of any paid staff;
c. Whether the organization has any physical facilities;
d. The organization's purposes and activities;
e. Whether membership in the organization is open to the public;
f. Whether any fees or dues must be paid in order to participate or acquire membership;
g. The organization's structure.[148]

The complainant is not required to exhaust his/her remedy by filing a complaint with DFEH prior to lodging a civil suit, but DFEH does accept, investigate and conciliate complaints, consistent with its statutory jurisdiction.[149] The Director can issue class complaints arising out of alleged violations of the Unruh Act and, as with other types of actions, the complainant and/or complainant's counsel and DFEH's Legal Division can prosecute a case together irrespective of whether or not the complainant formally intervenes in the pending action.

The Unruh Act is inapplicable in the employment context. Employees are not akin to and do not have the same relationship to a business establishment as clients, patrons or customers. Accordingly, a person claiming to be aggrieved may not file a complaint with DFEH, founded upon violation(s) of the Unruh Act, against his/her employer or any entity with which he/she stands in a relationship that is akin to that of employer-employee, e.g., independent contractor or agent.

> *Example: The complainant was a physician partner in a very large medical group who contended that she was subjected to discrimination because of her race and gender, as well as retaliation. She also claimed that her rights under the Unruh Act were violated. The complainant argued that she was entitled to the Unruh Act's protections because she was entitled to "receive economic benefits, the use of certain medical facilities, medical supplies and other goods, management courses, and a variety of privileges, advantages, and services, including opportunities for promotion and advancement."*

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147 *Mitchell v. Sung* (1993) 816 F.Supp. 597.

148 *Inland Mediation Bd. v. City of Pomona* (2001) 158 F.Supp.2d 1120; *Harris v. Mothers Against Drunk Drivin*g (1995) 40 Cal.App.4th 16, *as modified, rehearing denied, review denied.*

149 "It is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code." (Gov. Code, § 12948.)

However, the court dismissed her Unruh Act claim, finding that whether she was deemed a partner or employee of the medical group, the Unruh Act did not apply.

The act of subjecting an employee to discrimination does not constitute discrimination "by a 'business establishment' in the course of furnishing goods, services or facilities" to a client, customer or patron. The Unruh Act only applies where the complainant was in a relationship with the business establishment that committed the violation which is "similar to that of the customer in the customer-proprietor relationship. . ."

The fact that the complainant was a "recipient" of particular benefits was not persuasive, as any "mere employee" received similar benefits from the medical group. "Being a 'recipient' of these benefits does not entitle [the complainant] to the protection of the Unruh Act any more than an employee's being the 'recipient' of a paycheck gives him/her Unruh Act protection."[150]

Likewise, the Unruh Act is inapplicable in the contractor-subcontractor context,[151] but has been held to govern agency relationships such as when a business establishment is an agent providing services to a client.[152]

Prisons are not business establishments.

> The word "business" embraces everything about which one can be employed, and it is often synonymous with calling, occupation or trade, engaged in for the purpose of making a livelihood or gain. (*O'Connor v. Village Green Owners Assn. (1983)* 33 Cal.3d 790, 795.) According to this test, a prison does not qualify as a "business" because prisoners are not engaged in a calling, occupation or trade for purposes of making a livelihood or gain.[153]

Private social clubs are not required to comply with the Unruh Act unless they transact business with the general public, in addition to serving their members.[154]

Public schools may be held liable for a failure to provide a student the equal advantages and privileges of a public education.[155] To date, no court has held

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[150] *Strother v. Southern California Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859.
[151] *Gauvin v. Trombatore* (1988) 682 F.Supp. 1067.
[152] *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, review denied.
[153] *Taormina v. California Dept. of Corrections* (1996) 946 F.Supp. 829, affirmed and remanded 132 F.3d 40.
[154] *Harris v. Mothers Against Drunk Driving* (1995) 40 Cal.App.4th 16, as modified, rehearing denied, review denied.

that a private school must operate within the Unruh Act's parameters except to the extent that a refusal to admit or provide services, advantages or privileges to a student constitutes a violation of California's "constitutional or statutory proscription against discrimination."[156]

See complete discussion in Chapter entitled "Unruh Civil Rights Act."

5. The Ralph Civil Rights Act

The Ralph Civil Rights Act (Ralph Act), set forth at Civil Code section 51.7, prohibits violence, or intimidation by threat of violence, against their person or property because of:

a. Political affiliation;
b. On account of any characteristic listed or defined in the Unruh Act (sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation);
c. Position in a labor dispute, except statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing; or
d. Because another person perceives them to have one or more of those characteristics.

As with the Unruh Act, the bases of discrimination enunciated in the statute are illustrative, not dispositive.

Also like the Unruh Act, a complainant may, but is not required to, file a complaint with DFEH before pursuing a remedy for a violation of the Ralph Act.[157]

A complaint alleging violation(s) of the Ralph Act must be filed within three years of the discriminatory act.[158] However, the statute of limitations is extended for a maximum of one year in the event that the identity of the respondent(s) is unknown to the complainant. "In such instances, the statute of limitations within which to file a complaint is three years from the alleged discriminatory act or one year from the date upon which the complainant ascertains the respondent's(s') identity."[159]

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[155] *Davison ex rel. Sims v. Santa Barbara High School Dist.* (1998) 48 F.Supp.2d 1225.
[156] *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887, 892.
[157] "Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code." (Civ. Code, § 52, subd. (f).)
[158] Civil Code, § 52; Code Civ. Pro., § 338.
[159] Gov. Code, § 12960, subd. (d)(3).

6. Public Accommodations

All persons with disabilities are entitled to “full and equal access” to all public

> accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or State or federal regulation, and applicable alike to all persons.[160]

Like the Unruh and Ralph Acts, section 54.1 is incorporated into the FEHA.[161]

See complete discussion in Chapter entitled “Unruh Civil Rights Act.”

[160] Civil Code, § 54.1.
[161] Gov. Code, § 12948.